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Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce, The

Mary Sarah Bilder

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The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce

*Mary Sarah Bilder**

A long time ago, but not too long ago,
Ships came from across the sea
Bringing Pilgrims and prayer-makers,
Adventurers and booty seekers,
Free men and indentured servants,
Slave men and slave masters, all new—
To a new world, America!

—Langston Hughes¹

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1. Langston Hughes, *Freedom's Plow*, in *THE COLLECTED POEMS OF LANGSTON HUGHES* 263 (Arnold Rampersad ed., 1994).

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I. INTRODUCTION

People are articles of commerce, or so the United States Supreme Court held in 1941, emphasizing that the issue was "settled beyond question."² At the time, Justice Jackson expressed some discomfort with the theory that "the migrations of a human being . . . [are] commerce."³ The Court, however, has not wavered from this analytical position. Indeed, like many legal constructs, it has inspired little reflection.

Modern immigration law scholarship has been more interested in exploring the idea that immigration power is "an incident of sovereignty," than puzzling over people as articles of commerce. The inherent sovereignty or plenary power doctrine, however, was the second theory of immigration authority—not adopted until 1889.⁴ For the first one hundred years, the Court debated the question of immigration power under the Commerce Clause. The consequences of this unsettled jurisprudence reappear in every constitutional law casebook: the classic line of commerce cases stretching from *Gibbons*,⁵ through *Miln*,⁶ to *The Passenger Cases*.⁷ In 1876, the Court finally

2. *Edwards v. California*, 314 U.S. 160, 172 (1941) (striking down a statute making it a misdemeanor to bring nonresident indigents into state).

3. *Id.* at 182 (Jackson, J., concurring). Jackson noted that such a theory could result in "denaturing human rights." He suggested using the privileges and immunities clause to protect interstate migrations of indigents.

4. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889). For most of the twentieth century the Court has followed this later theory. See THOMAS ALEXANDER ALENIKOFF & DAVID A. MARTIN, *IMMIGRATION PROCESS AND POLICY* 15-16 (1985); DAVID WEISSBRODT, *IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL* 49-51 (3d ed. 1992); Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-53 (1990); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989).

5. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

6. *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837).

7. *The Passenger Cases* (*Smith v. Turner*, *Norris v. Boston*), 48 U.S. (7 How.) 283 (1849). Constitutional historians still puzzle over—and now rarely read—the lengthy opinions of the nineteenth-century Supreme Court as the Court "groped for formulations with little clarity or agreement." GERALD GUNTHER, *CONSTITUTIONAL LAW* 218 n.2 (12th ed. 1991). Leading constitutional law books consequently present snippets of these cases as obligatory reading for "early interpretations of the commerce

clause," old theories of federalism, or the claimed legitimacy of state restrictions on paupers and other undesired people. LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 404-5 (2d ed. 1988); see PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 127-40 (2d ed. 1983); GUNTHER, *supra*, at 217-18 n.11; JOHN E. NOWAK ET. AL., *CONSTITUTIONAL LAW* 134 nn.18-21, 264-66 (3d ed. 1986).

Most articles discussing *Miln* and the line of cases stretching from *Gibbons v. Ogden* to the *Passenger Cases* interpret the cases from the perspective of federal-state relations and powers. See, e.g., Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297, 1328-30 (1994); William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1373-74, 1397 (1994); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 791-92 (1994); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121, 136-37 (1994); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993); Alfred L. Brophy, *Let Us Go Back and Stand upon the Constitution: Federal-State Relations in Scott v. Sandford*, 90 COLUM. L. REV. 192, 200, 214-15 (1990); Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CALIF. L. REV. 235, 245-46 (1989); Albert Broderick, *"To Endure for Ages to Come": A Bicentennial View of the Constitution: From Constitutional Politics to Constitutional Law: The Supreme Court's First Fifty Years*, 65 N.C. L. REV. 945, 949-50 (1987); David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-1864*, 1983 DUKE L.J. 695, 744 (1983); David P. Currie, *The Constitution in the Supreme Court: Contracts and Commerce, 1836-1864*, 1983 DUKE L.J. 471, 474-78, 503-4, 507-8 (1983).

Even those writers who have noted these cases' relationship to slavery continue to view the connection from a federal-state powers perspective. See, e.g., Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT. L. REV. 1087 (1993); Paul Finkelman, *The Color of Law*, 87 NW. U. L. REV. 937, 974 (1993) (book review). One casebook also suggests that these cases and the "exclusive power" theory were "deeply influenced by the issue of slavery." The suggestion is advanced as the last note in a set discussing the "fundamental framework" of regulating commerce. GEOFFREY R. STONE ET. AL., *CONSTITUTIONAL LAW* 252-53 (1986). The most consistent attempt to connect the cases to slavery appears in Carl Swisher's volume for the Holmes Devise. See CARL B. SWISHER, *THE TANEY PERIOD: 1836-64*, at 327-423, in particular, 359-60, 365, 378, 390, 395, 396 (1974). Swisher, however, concludes:

[I]n the conflict of political theory between nationalism and localism slavery was only one of the critical factors. Immigration . . . raised problems of its own, quite apart from the fact that lawmaking for transportation or exclusion of white alien passengers had implications for the transportation or exclusion of free Negroes and slaves.

Id. at 396.

In contrast to these discussions, this article suggests that the connections among immigration, commerce, and slavery were less those of analogy and general influence

unanimously decided to link immigration to an exclusive federal commerce power based on the perception that immigrants were "articles of commerce."⁸

Although scholars have discussed the Commerce Clause as a source of immigration power, few have explored the reasons for the century-long struggle over immigration power.⁹ As a textual matter, the struggle occurred because the Constitution does not explicitly give Congress authority over immigration.¹⁰ This article moves beyond a textual analysis to argue that the origins of this struggle can be found over two centuries earlier in the history

than an integral historical factor of the development of these doctrinal areas.

Scholars noting the cases' relationship to colonial immigration law have focused on the exclusion of paupers and other incoming passengers in order to legitimize or condemn modern immigration problems. See BREST & LEVINSON, *supra* at 129 (stating that *Miln* should be read "with the knowledge that towns had prevented the immigration of paupers since Colonial times."); EDITH ABBOTT, IMMIGRATION: SELECTED DOCUMENTS AND CASE RECORDS 97 (reprint ed. 1969) (1924) ("The state passenger acts were the direct outgrowth of the poor laws, and in a few states, notably New York and Massachusetts, were certainly only a later substitute for those sections of the poor laws that had established a bonding system to protect the taxpayers in the port cities and states by providing for the support of the pauper, diseased, lunatic, and other immigrants who became chargeable."); Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933 (1995); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1896-1901 (1993) (this article is further developed in a book, GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996), which appeared as this article was going to press); see also Benjamin Klebarer, *State and Local Immigration Regulation in the United States before 1882*, 3 INT'L R. SOC. HIST. 269 (1958). Indeed, a number of articles, many of them arguing against state ability to exclude paupers, cite *Miln* as an example of the Court's acceptance of the exclusion of paupers, beggars, or persons with "moral pestilence." See, e.g., Daniel Gordon, *California Retreats to the Past: The Paradox of Unenforceable Immigration Law and Edwards v. California, the Depression, and Earl Warren*, 24 SW. U. L. REV. 319, 347-49 (1995); Adrienne L. Hiegel, *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451, 1463 (1994); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1329 (1993); David P. Currie, *The Constitution In The Supreme Court: The Preferred-Position Debate, 1941-1946*, 37 CATH. U.L. REV. 39, 62 n.141 (1987).

8. *Henderson v. Mayor of New York*, 92 U.S. 259 (1875).

9. See ALENIKOFF & MARTIN, *supra* note 4, at 7-18; see AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION PRIMER: A GUIDE TO LAW AND PRACTICE 1-4 (3d ed. 1994) ("Congressional control over immigration . . . has been extrapolated from its authority under the Commerce Clause to regulate the flow of commerce across the national borders.").

10. ALENIKOFF & MARTIN, *supra* note 4, at 1.

of indentured servitude and slavery.¹¹ The existence and dominance of indentured servitude as a means of immigration ensured that early immigration regulation operated with the assumption that people were articles of commerce. Before Independence, this assumption went unquestioned. But as slavery, indentured servitude, and immigration intertwined between Independence and the end of the Civil War, this assumption—that persons entering from abroad were "articles of commerce"—became one of the most disputed questions of constitutional law.

My interest in exploring this early history does not lie in the implications for modern immigration law of the commerce power theory—I leave that issue to immigration scholars. My curiosity instead involves what Felix Frankfurter once called "the cultural and psychological roots of legal doctrine."¹² Modern legal scholars might term this inquiry one about legal culture.¹³ But

11. One of the lawyers who argued *Miln* seemed unconsciously aware of the link between early immigration law and slavery. His repetition of the word, "peculiar," often associated with the "peculiar institution" of slavery, underscores this article's argument that slavery, indentured servitude, and immigration were linked in the Court's decisions. He stated:

The law was one peculiar to this country, and it grew out of circumstances peculiar to this country. The emigration to the United States since the American revolution, was unprecedented in history, not merely in numbers, but in character. . . . It was not a military colonization . . . nor was it mercantile . . . It was a constant and steady migration of civilized Europeans to an independent country, controlled by a civilized people. This migration was peculiar to the United States, and we cannot find legal analogies in other countries.

Miln, 36 U.S. at 106. *Miln* involved an 1824 New York law that required the master of vessels arriving in New York to report the name, age, and last legal settlement of all passengers and to give bonds for each non-citizen passenger. The law had arisen, according to a contemporaneous article in the *North American Review*, as New York attempted to regulate "the influx of emigration, amounting now almost to a torrent, from foreign shores." 46 THE NORTH AMERICAN REVIEW 126, 132-33 (1838).

12. FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 8-9 (1937).

13. See, e.g., ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE (1984); A.G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810 (1981); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35, at xi, xiv, 1-4 (1991); William W. Fisher, III, *Ideology and Imagery in the Law of Slavery*, 68 CHI.-KENT L. REV. 1051-83 (1993); Alfred S. Konefsky, *Law and Culture in Antebellum Boston*, 40 STAN. L. REV. 1119 (1988); R. Kent Newmyer, *Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence*, 74 J. AM. HIST. 814 (1987); Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599 (1992).

my goal in exploring the legal culture surrounding the idea of people as "articles of commerce"¹⁴ is not to trace the culture's desire to include or exclude immigrants. My hope, instead, is to search for what Toni Morrison describes as "the shadows of the presence from which the text has fled."¹⁵ I believe that the Court's nineteenth-century opinions on immigration under the Commerce Clause reveal the shadows of slaves and indentured servants.¹⁶

This article suggests that the relationship between the larger culture or cultures and the legal culture is tricky. In the seventeenth and eighteenth centuries, the view of the legal culture and the culture of indentured servants were similar in that both perceived indentured servants to be articles of commerce. By the late nineteenth century, the larger culture no longer perceived people as articles of commerce. This new perception curiously permitted the legal culture to accept the assumption that people were "articles of commerce" for the purposes of commerce clause analysis and immigration power.

14. "Commerce" and "articles of commerce" can be seen as "cultural signifiers, words intended to convey a bundle of associations and thereby to invoke an appeal to values perceived to be of great importance in the culture." WHITE, *supra* note 13, at 4. This article demonstrates that these legal assumptions or cultural signifiers have not had constant or uncontested meanings. The article uses an absence of quotation marks around the phrase—articles of commerce—to denote the perception that people were in reality traded goods. The presence of the quotes—"articles of commerce"—refers to the legal assumption under the Commerce Clause. Cf. Mary Sarah Bilder, *The Shrinking Back: The Law of Biography*, 43 STAN. L. REV. 299 (1991) (exploring the legal culture's assumptions about objectivity, intent, and the individual in the context of intellectual property law).

15. Toni Morrison, *Unspeaking Things Unspoken: The Afro-American Presence in American Literature*, 28 MICH. Q. R. 1, 12 (1989).

16. These shadows continue today as recent events surrounding immigration—the grounding of the *Golden Venture* in New York harbor and the discovery of Thai workers in a California garment factory—demonstrate. Although contemporary legal analyses might classify the immigrants involved as "articles of commerce," these people were articles of commerce in some real sense of the phrase. They were indentured servants. Their labor was bought and sold in exchange for transportation to the United States. The Board of Immigration Appeals noted that the Chinese passengers aboard the *Golden Venture* arrived as "indentured servants." *Chung v. Reno*, 886 F. Supp. 1172, 1176 n.3 (M.D. Pa. 1995) (quoting *Matter of G-*, Int. Dec. 3215, at 7). Similarly, the Thai immigrants worked in "involuntary servitude" because of "inflated debts they could never repay, mostly for their transportation to this country." NEW YORK TIMES, Aug. 4, 1995, at A1, col. 5; see NEW YORK TIMES, Aug. 16, 1995, at A22, col. 4.; *id.*, Aug. 20, 1995, at E8, col. 1; *id.*, Sept. 7, 1995, at A28, col. 1; *id.*, Sept. 13, 1995, at A20, col. 4; *id.*, Sept. 21, 1995, at A16, col. 1.

The indentured servitude faced by the Chinese or Thai immigrants does not often confront courts, lawyers, or legal academics. Indeed, courts often treat the institution almost as a historic joke or as a description of lawyers' relationships with clients. A repeatedly quoted Fifth Circuit Court of Appeals opinion noted that a "client by virtue

Studies of the origins of early immigration law have fled these shadows—perhaps uncomfortable with a discussion of a commerce in white bound labor; perhaps uncomfortable with the idea that the culture of American slavery left a legacy in legal areas outside of civil rights, equal protection, and property; perhaps uncomfortable with the suggestion that constitutional disagreements may arise from differing cultural perceptions instead of doctrinal disputes. A prefatory comment on bound labor seems essential. White indentured servitude cannot be equated with the enslavement of Africans and African-Americans.¹⁷ Any similarities in the early seventeenth century treatment of white indentured servants and "Negro Servants" are insignificant when compared to the racial oppression perpetuated by the institution of American slavery and race prejudice. Indentured servants were to become free; slaves were to remain unfree.¹⁸

The indentured servitude trade of the seventeenth and eighteenth centuries, however, nonetheless blurred one aspect of the distinction. Although the trade in indentured servants was "far from the abuses of the slave trade,"¹⁹ it too was perceived by the colonial Anglo-American world as a form of commerce. The indentured servants within it were considered articles of commerce. This initial perception that immigrants were articles of commerce and the subsequent conviction that white immigrants should not carry the same legal label as black slaves caused a century of conflict in the development of federal immigration law.²⁰

of a contract with his attorney is not made an indentured servant, a puppet on counsel's string, nor a chair in the courtroom." *Singleton v. Foreman*, 435 F.2d 962, 970 (5th Cir. 1970); see *Mekdeci v. Merrell Nat'l Labs.*, 711 F.2d 1510, 1521 (11th Cir. 1983). Courts have spent more time interpreting "involuntary servitude" under the Thirteenth Amendment. See *United States v. Kozminski*, 487 U.S. 931 (1988).

17. For an attempt to equate the two that is both bizarre and racist, see MICHAEL A. HOFFMAN, *THEY WERE WHITE AND THEY WERE SLAVES: THE UNTOLD HISTORY OF THE ENSLAVEMENT OF WHITES IN EARLY AMERICA* (1991). His book, which quotes selectively yet liberally from scholarly works on indentured servitude, claims that "Establishment-funded and approved house scholars" have created a "cover-up" to deny "the true history of White Slavery." *Id.* at 65. In his book, published by Wiswell Ruffin House, Hoffman lists himself as the author of *SECRETS OF MASONIC MIND CONTROL* and the *PSYCHOLOGY AND EPISTEMOLOGY OF HOLOCAUST NEWSPEAK*.

18. Henry A. Gemery, *Markets for Migrants: English Indentured Servitude and Emigration in the Seventeenth and Eighteenth Centuries*, in *COLONIALISM AND MIGRATION: INDENTURED LABOUR BEFORE AND AFTER SLAVERY* 33, 50 (P.C. Emmer ed., 1986).

19. *Id.*

20. The article uses "immigrant" throughout the article to refer to people who came to British North America and the United States in a manner that can be

To tell this story, this article proceeds chronologically. Part II sketches the background of indentured servitude as a regulated form of immigration. Part III argues that the indentured servant trade was perceived as a commerce throughout the seventeenth and eighteenth centuries.²¹ Part IV examines the disappearance of the indentured servant trade between 1780-1820 and demonstrates that the Constitution and early state statutes betrayed the legal culture's confusion over whether immigrants were to be "articles of commerce"—"imports" or "migrants." Part V reinterprets three famous antebellum commerce cases and one slavery case. It argues that the inability of the Court to reach consensus arose because, as slavery became a national concern, the Court came to profound disagreement over whether people—particularly white European immigrants—should be considered "articles of commerce." Part VI completes the story and proves the significance of slavery to the struggle. In 1876, as indentured servitude returned, post-Reconstruction perceptions led the Court unanimously to decide that all people were "articles of commerce" and to begin the period of modern immigration law.

II. IMMIGRANTS AS INDENTURED SERVANTS

During the colonial period, most of the laws dealing with immigration—the voluntary transoceanic movement of people—were laws relating to indentured servants. People did travel to British North America as paying passengers, but the laws largely ignored this group. The colonial legislatures were concerned with the majority of immigrants who were transported as indentured servants. Our cultural images of early immigration are of self-financing, religious dissidents—for example, the Pilgrims—but economic, labor, and demographic historians have shown that the colonial concern with indentured servants was quantitatively justified.²² Because indentured servitude has tended to be overlooked in immigration history, this section discusses the people who came as indentured servants and what their lives were like in British North America.

understood as at least somewhat voluntary. Prior to the late nineteenth century, "emigrant" was actually the preferred term in legislation and secondary material.

21. Because New York, Pennsylvania, Maryland, and Virginia received most of the transatlantic migration prior to and shortly after the Revolution, the article focuses on their legislation. It includes, in addition, a discussion of New England to illuminate the relationship between town poor laws and immigration.

22. See T.H. Breen & Stephen Foster, *Moving to the New World: The Character of Early Massachusetts Immigration*, 30 WILLIAM & MARY Q. 189-222 (3d ser. 1973); Anthony Salerno, *The Social Background of Seventeenth-Century Emigration to America*, 19 J. BRITISH STUDIES 31, 51-52 (1979).

Indentured servitude is part of the institution of "bound labor."²³ Indentured servants were people bound to labor under a contract.²⁴ British and European indentured servants appear to have been the dominant labor force until the 1680s in the British North American colonies.²⁵ Around 1680, a complex series of events produced a shift in the labor force. These changes involved, for example, a decrease in the British and European supply of indentured servants, the entry of the British into the slave trade, new colonial statutes that cut off traditional avenues of legal escape from lifetime servitude for Africans and their descendants, a decrease in the opportunities for indentured servants after servitude, increased concern about white indentured servants who easily blended into an increasing white population, a concern about controlling lower classes, and white prejudice about differences between Europeans and Africans. As a product of these factors, after 1680 the dominant form of bound labor shifted inexorably towards the race-based, enslavement of Africans and African-Americans.²⁶

23. See RICHARD MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* 310 (1946). Robert Steinfeld argues that indentured labor or contractual servitude was not initially distinguished from wage labor. See ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870*, at 13 (1991). For a discussion of master-servant law and the development of labor law, see CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 223-97 (1993). Immigration and labor long have been linked. See KITTY CALAVITA, *U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR: 1820-1924* (1984).

24. See DAVID W. GALENSON, *WHITE SERVITUDE IN COLONIAL AMERICA: AN ECONOMIC ANALYSIS* 13 (1981); MORRIS, *supra* note 23, at 310. The term originated because the agreement was "by deed indented." JAMES CURTIS BALLAGH, *WHITE SERVITUDE IN THE COLONY OF VIRGINIA: A STUDY OF THE SYSTEM OF INDENTURED LABOR IN THE AMERICAN COLONIES* 34 (1895). The term "indentured servant" encompassed Indians, apprentices, domestic poor, debtors, convicts, foreign convicts, and those foreigners entering the country as "servants." The use of "servant" changed during the eighteenth and nineteenth centuries in England and the colonies. It included anyone in a supervisory capacity under the service of a master, a wage earner who lived with the master for a period of years, and anyone who worked generally for a master. See STEINFELD, *supra* note 23, at 17-22, 126-29. For late eighteenth and early nineteenth century discussions of the various meanings of "servant" by the Pennsylvania Supreme Court, see *Respublica v. Catharine Keppele*, 1 Yeates 233 (Pa. 1793); *Ex parte Meason*, 5 Binney 167 (Pa. 1812); *Boniface v. Scott*, 3 Serg. and Rawle 351 (Pa. 1817).

25. See EDMUND MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 105-6 (1975).

26. The historical literature on this shift is too vast to list and a number of fine bibliographies and historiographies are available. For a recent attempt to provide an overview, see PETER KOLCHIN, *AMERICAN SLAVERY: 1619-1877*, at 3-27 (1993), and

Recent estimates suggest that at least 600,000 British and Europeans migrated to the colonies between 1650-1780.²⁷ Many, if not most, of these immigrants came as "imported white servants"—indentured servants. One recent economic historian suggests that "between half and two-thirds of all white immigrants to the American colonies after the 1630s and before independence came under indenture."²⁸ Another confirms that "some 60%" of immigrants in the seventeenth century were indentured servants, as were a "sizable share" of eighteenth-century emigrants.²⁹ The immigrants "did not travel to all the colonies in anything like equal numbers."³⁰ By the 1770s,

bibliography at 257-91. For a summary of economic issues, see JOHN J. MCCUSKER & RUSSELL R. MENARD, *THE ECONOMY OF BRITISH AMERICA, 1607-1783*, at 238-45 (1985). For a summary of the debate over race and prejudice and slavery, see Alden T. Vaughan, *The Origins Debate: Slavery and Racism in Seventeenth-Century Virginia*, 97 VA. MAG. HIST. & BIOG. 311-54 (1989).

27. GALENSON, *supra* note 24, at 17.

28. *Id.* at 3-4. Because many records are missing, estimates vary. See Farley Grubb, *The Incidence of Servitude in Trans-Atlantic Migration, 1771-1804*, 22 EXPLORATIONS ECON. HIST. 316, 317-18 & nn.2-4 (1985). Abbot Smith claimed that "half of all persons who came to colonies south of New England were servants." ABBOT E. SMITH, *COLONISTS IN BONDAGE* 3-4 (1947). Edmund Morris considered the figure of half of all people "very conservative." MORRIS, *supra* note 23, at 315-16. Immigration to mainland British North America during the seventeenth century has been estimated at 116,000 people to southern colonies and 39,000 to northern colonies. See Henry A. Gemery, *Emigration from the British Isles to the New World, 1630-1700: Inferences from Colonial Populations*, 5 RESEARCH ECON. HIST. 179, 180 (1980).

29. Gemery, *supra* note 18, at 33, 38-39.

30. BERNARD BAILYN, *VOYAGERS TO THE WEST: A PASSAGE IN PEOPLING OF AMERICA ON THE EVE OF THE REVOLUTION* 205 (1986). In 1624, 378 out of 2,500 people in Virginia were indentured servants and, at least between 1664 and 1671, Virginia imported an average of 1,500 indentured servants per year. BALLAGH, *supra* note 24, at 41. Indentured servitude also began early in Massachusetts; however, the heavy periods of importation occurred between 1710 and 1750. See Lawrence W. Towner, *A Good Master Well Served: A Social History of Servitude in Massachusetts, 1620-1750*, at 63, 332 (1955) (unpublished Ph.D. dissertation, Northwestern University). New York received few indentured servants despite attempts by New York's governor in 1712 and 1757 to pass laws encouraging the importation of white indentured servants. SAMUEL MCKEE, JR., *LABOR IN NEW YORK: 1664-1776*, at 90-91, 93, 94 (reprint ed. 1965) (1935). In the Delaware region, servants could be found by 1663; and by the 1680s, 271 indentured servants were present in Pennsylvania. By 1729, Philadelphia alone had 582 indentured servants and within three years had 1,500. See CHEESMAN A. HERRICK, *WHITE SERVITUDE IN PENNSYLVANIA: INDENTURED AND REDEMPTION LABOR IN COLONY AND COMMONWEALTH* 27 (1926); SHARON V. SALINGER, "TO SERVE WELL AND FAITHFULLY": *LABOR AND INDENTURED SERVANTS IN PENNSYLVANIA, 1682-1800*, at

93.6 percent of immigrants to the thirteen colonies arrived in New York, Pennsylvania, Maryland, Virginia, and North Carolina.³¹ Of the many who arrived as indentured servants, eighty-eight percent went to Pennsylvania, Maryland, and Virginia. In fact, Maryland received half of all of these indentured servants. New York received only around eight percent and New England absorbed an almost negligible percentage of indentured servants.³² Although the influx of indentured servants varied over the colonies and over time, indentured servitude remained a method of migration until 1819.

Indentured servants were the immigrants who lacked the economic resources to pay for passage. For most, indentured servitude was "one more stage in a migratory career" of searching for employment. After moving across England or Europe, crossing the Atlantic was their final hope.³³ They were comprised of three distinct groups: (1) immigrants landing with an indenture; (2) "redemptioners"; and (3) transported convicts.³⁴ Transported convicts obviously lacked the same degree of voluntariness in their passage as other indentured servants; however, unlike Africans held as slaves, after the convicts' term was completed, they could choose whether or not to return to their initial home. Indeed, the British often referred to convicts as "His Majesty's Seven Years Passengers."³⁵ Historians tend to discuss them in the same category as other white indentured servants, a practice this article follows. The primary differences among the three categories involved how they entered into the indenture.

The first category of indentured servants included many immigrants from England, Scotland, and Ireland. They "broadly represent[ed] the English

22, 57-58 (1987).

31. BAILYN, *supra* note 30, at 205. The Register of Emigrants from 1773-1776 reveals that "more than 4 out of 5 of the emigrants" to Maryland, Pennsylvania, and Virginia were indentured servants. William Miller, *The Effects of the American Revolution on Indentured Servitude*, 7 PENN. HIST. 131, 140 (1940).

32. BAILYN, *supra* note 30, at 209-10; *see* GALENSON, *supra* note 24, at 4. Bailyn offers additional figures for 1770s. In Maryland, the percentage of indentured servants of immigrants was 97.2 percent. "Less than 9% of the combined migration to New York and North Carolina were indentured servants. Not a single indentured servant can be found among those who emigrated . . . to New England." BAILYN, *supra* note 30, at 208-10.

33. David Souden, *English Indentured Servants and the Trans-Atlantic Colonial Economy*, INTERNATIONAL LABOUR MIGRATION: HISTORICAL PERSPECTIVES 19, 28 (Shula Marks & Peter Richardson eds., 1984).

34. *See* MARCUS W. JERNEGAN, *LABORING AND DEPENDENT CLASSES IN COLONIAL AMERICA, 1607-1783*, at 47-48 (reprint ed. 1980) (1931); BALLAGH, *supra* note 24, at 66.

35. George R. Mellor, *Emigration from the British Isles to the New World, 1765-1776*, 40 HISTORY: J. OF HIST. ASS'N. 68, 71 (1955).

society of the period" with backgrounds ranging from paupers and unskilled labor, skilled trades, and even gentry status.³⁶ Many were "between the ages of 15 and 25," "predominantly unmarried males," often with deceased or absentee fathers.³⁷ They were bound by indentures for a specific length of time. Indentures could be entered into before the immigrant left the country of origin.³⁸ Alternatively, the colonies permitted immigrants who arrived without indentures to be bound by "custom." The period of "custom" was rapidly standardized by colonial statutes. For example, a 1715 Maryland statute provided:

whosoever shall transport any servant into this province without indenture, such servant being above the age of twenty-two years, shall be obliged to serve the full time of five years; if between eighteen and twenty-two years, without indentures, six years; if between fifteen and eighteen, without indentures, seven years; if under fifteen, without indentures, shall serve till he or they arrive at the full age of twenty-two years.

Local courts usually determined the age of indentured servants lacking indentures. Not surprisingly, colonial court records abound with disputes over ages. Statutes such as that of Maryland avoided overcrowding the court system by requiring judicial determination only if the master claimed more than five years service.³⁹ In general, the contract length appears to have "stayed constant at a mode of four years for adults."⁴⁰

The second category, that of "redemptioners," was comprised mostly of immigrants from Germany or what contemporaries referred to as the Palatine.⁴¹ Redemptioners often traveled in larger family groups, usually

36. Gemery, *supra* note 18, at 42; Souden, *supra* note 33, at 26.

37. Farley Grubb, *Fatherless and Friendless: Factors Influencing the Flow of English Emigrant Servants*, 52 J. ECON. HIST. 85, 90, 94, 96 (1992); Gemery, *supra* note 18, at 40-41.

38. GALENSON, *supra* note 24, at 15. Under this type of indenture, the importer bore the risk. If the indenture contract had to be sold for less money than the cost of passage because of a labor surplus in the colonies, the importer lost money. According to one author, "the British regulations for the trade required that a legal agreement, or contract, must be executed for each emigrant before he was taken shipboard." HERRICK, *supra* note 30, at 4.

39. An ACT relating to servants and slaves, ch. XLIV (April 1715), 1 LAWS OF MARYLAND, 1692-1799 n.p. (William Kilty ed., 1799-1800); see MORRIS, *supra* note 23, at 312-13. In 1643, Virginia passed its first statute providing statutory periods of indenture. BALLAGH, *supra* note 24, at 40.

40. Grubb, *supra* note 37, at 89; see Gemery, *supra* note 18, at 36.

41. See WALTER ALLEN KNITTLE, EARLY EIGHTEENTH CENTURY PALATINE EMIGRATION: A BRITISH GOVERNMENT REDEMPTIONER PROJECT TO MANUFACTURE

destined for Pennsylvania.⁴² They migrated without paying the entire passage fare or signing an indenture. On occasion, they were given time, often thirty days after arrival, to pay the entire or remaining portion of the fare. If they could not pay, they were subject to legal action under debtor laws and sold into servitude by the master of the vessel for whatever period would cover the passage fare. In practice, however, "captains of most ships . . . never permitted redemptioners to leave their vessels until they signed indentures." Indeed, redemptioners often had to pay for relatives who died on the passage. Redemptioners, like other indentured servants, averaged four years of service.⁴³

For the third category of immigrants, the cost of passage was irrelevant. The British government transported English convicts and a few Scottish and Irish convicts to the colonies. On an informal basis, male and female felons, paupers, vagrants, and political prisoners had been transported to the colonies by English merchants since 1661.⁴⁴ In 1718, after the colonies attempted to exclude the importation of "the great numbers of felons and other desperate villains," Parliament enacted a statute authorizing transportation to the colonies.⁴⁵ Given the opportunity for guaranteed legal profit—the merchants

NAVAL STORES 1-2 (1937). The area included territories along the Rhine River. Migration from these regions grew out of the end of the Thirty Years War, terrible climate conditions, religious disagreements, and "land hunger." *Id.* at 11.

42. Pennsylvania was the destination of choice due to heavy advertising by William Penn. *See id.* at 19-20.

43. STEINFELD, *supra* note 23, at 246; *see* Günter Moltmann, *The Migration of German Redemptioners to North America, 1720-1820*, in COLONIALISM AND MIGRATION: INDENTURED LABOUR BEFORE AND AFTER SLAVERY 104-22 (P.C. Emmer ed., 1986); *see also* GALENSON, *supra* note 24, at 14-15; HERRICK, *supra* note 30, at 3-4. The importer faced no risk because, assuming some market for servants, he was assured full payment. For a description of the redemption system, *see* Farley Grubb, *The Auction of Redemptioners Servants, Philadelphia, 1771-1804: An Economic Analysis*, 48 ECON. HIST. 583-603 (1988). For a case describing the redemption process, *see* *Respublica v. Keeper of the Prison of the City and County of Philadelphia*, 2 Yeates 257 (Pa. 1797).

44. *See* A. ROGER EKIRCH, *BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES, 1718-1775*, at 1 (1987); SMITH, *supra* note 28, at 89-110; BALLAGH, *supra* note 24, at 35-36. Convicts received a seven-year sentence for service; those sentenced to death were transported for fourteen years. *See* JERNEGAN, *supra* note 34, at 48; MORRIS, *supra* note 23, at 325.

45. BAILYN, *supra* note 30, at 260-62; An Act for the further preventing Robbery, Burglary, and other Felonies, and for the more effectual Transportation of Felons, 4 George II, c. 11 (1717); *see also* HERRICK, *supra* note 30, at 118; JERNEGAN, *supra* note 34, at 218-49; SMITH, *supra* note 28, at 104. In 1766, the act was extended to Scotland. 6 George III, 23 c. (1766). Virginia banned their importation in 1670 and Maryland followed in 1676. The Virginia legislation concerned "jaile

received payment from the British government and the colonial purchaser, and the colonies were barred from banning the importation—the trade flourished.⁴⁶ "Commercial, not penal priorities guided the flow of convicts" "The Chesapeake colonies took in large numbers of felons because it made economic sense for merchants to send them there."⁴⁷ Approximately 50,000 convicts were shipped to the colonies between 1718 and 1775. During the eighteenth century, imported convicts "comprised almost one half of all indentured servants" in Maryland and "represented as much as a quarter of all British emigrants to colonial America."⁴⁸

Legal regulation of the lives of indentured servants was remarkably similar despite variations in the time, place, and manner of entry of the indentured servants.⁴⁹ Indentured servitude lasted for a period of time established by the indenture.⁵⁰ Regardless of length, the period tended to be inflexible. The

birds." Extracts from the records of the General Court (1670), 2 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 509-10 (William W. Hening ed., 1809-1823) [hereinafter THE STATUTES AT LARGE . . . OF VIRGINIA]. The Maryland statute "was disallowed by home government and for fear of forfeiture of charter was not reenacted." HERRICK, *supra* note 30, at 118.

46. See BAILYN, *supra* note 30, at 262; EKIRCH, *supra* note 44, at 17-18; SMITH, *supra* note 28, at 111-16, 133-35.

47. EKIRCH, *supra* note 44, at 118-19, 138-40.

48. *Id.* at 24-25, 27.

49. Detailed studies have been done on indentured servitude in Virginia, Maryland, and Pennsylvania. For Virginia, see BALLAGH, *supra* note 24; Warren M. Billings, *The Law of Servants and Slaves in Seventeenth-Century Virginia*, 99 VA. MAG. OF HIST. & BIOGRAPHY 45-62 (1991). For Maryland, see EUGENE I. MCCORMAC, *WHITE SERVITUDE IN MARYLAND, 1643-1820* (1904); Russell R. Menard, *From Servant to Freeholder: Status Mobility and Property Accumulation in Seventeenth-Century Maryland*, WILLIAM & MARY Q. 30-64 (3d ser. 1970). For Pennsylvania, see HERRICK, *supra* note 30; SALINGER, *supra* note 30. For New York, see MCKEE, *supra* note 30. More general studies including these colonies exists in MORRIS, *supra* note 23, and SMITH, *supra* note 28.

50. By the late 1700s, the length of the period was limited by law. An 1817 Maryland statute provided:

no emigrant shall in any case be bound to serve longer than four years, unless in case of male minors under the age of seventeen years, and female minors under the age of fourteen years, who may be obliged to serve any period so that the males may be free at the age of twenty-one years, and the females at eighteen.

An act relative to German and Swiss Redemptioners, ch. 226 (February 1818), LAWS OF MARYLAND [DECEMBER SESSION 1817] 225. In Virginia, the limit was seven years. An Act concerning servants, ch. LXXXIII (October 1785), 12 THE STATUTES AT LARGE . . . OF VIRGINIA, *supra* note 45, at 190-91; see BALLAGH, *supra* note 24,

master often could not release a sick indentured servant, permit an indentured servant to end the term of service early, or contract with the indentured servant during the first period for a new period of service.⁵¹ During the term of service, indentured servants constituted property: they were assignable under statutory provisions; they could be sold to satisfy a debt; and they passed by descent pursuant to testamentary laws.⁵² As a form of property, indentured servants were quite restricted in their freedom. They could not marry, trade with others, or travel without the master's consent.⁵³ If they ran away, they were brought back and their captors often received a reward for which the indentured servant had to reimburse the master. Upon return, the indentured servant usually had the time of service extended as a punishment.⁵⁴

at 66-67.

51. Virginia's 1705 "act concerning Slaves and Servants" provided that if a servant became sick or lame, "the said master or owner shall not put away the said servant, but shall maintain him or her, during the whole time he or she was before obliged to serve . . ." If the master "upon pretense of freedom" let the servant leave and the servant became chargeable to the parish, the master would be fined. Moreover, if sick or disabled servants could not be sold for sufficient value, the church-wardens of the parish would take care of the servant until the servant's time had expired; and if the servant could not be sold for sufficient value to cover the cost, then the master would be liable for the amount. The act also stated that any bargains by the master with the servant "for further service, or other matter or thing relating to liberty, or personal profit," would be void unless made in the presence of a court. An Act concerning Servants and Slaves, ch. XLIX (October 1705), 3 THE STATUTES AT LARGE . . . OF VIRGINIA, *supra* note 45, at 449-50. For a general treatment, see MORRIS, *supra* note 23, at 309-410; SMITH, *supra* note 28, at 229-34.

52. See An Act to prevent losses to Executors, ch. VIII (May 1730), 4 THE STATUTES AT LARGE . . . OF VIRGINIA, *supra* note 45, at 284; BALLAGH, *supra* note 24, at 43-44, 66; MORRIS, *supra* note 23, at 401-14.

53. Towards their servants, masters did have a few duties. For example, a 1705 Virginia act stated that "all masters and owners of servants, shall find and provide for their servants, wholesome and competent diet, clothing, and lodging." In addition, the statute barred "immoderate correction," or at least barred it in the absence of an order from a justice of the peace. The act also prohibited others from dealing with them and ministers from performing marriages. An Act concerning Servants and Slaves, ch. XLIX (October 1705), 3 THE STATUTES AT LARGE . . . OF VIRGINIA, *supra* note 45, at 447-48. A 1715 Maryland statute prohibited servants traveling "by land or water ten miles from the house of his, her or their master, mistress or dame, without a note under their hands . . ." An ACT relating to servants and slaves, ch. XLIV (April 1715), 1 LAWS OF MARYLAND, 1692-1799 n.p. (William Kilty ed., 1799-1800).

54. See An Act concerning Servants and Slaves, ch. XLIX (October 1705), 3 THE STATUTES AT LARGE . . . OF VIRGINIA, *supra* note 45, at 458; MORRIS, *supra* note 23, at 434-61; Billings, *supra* note 49, at 50.

Indentured servitude, unlike slavery, existed for only a period of years. Upon the completion of service, indentured servants in most colonies received "freedom dues." At first, the colonies often made land grants. In early Maryland, for example, perhaps as many as ninety percent of indentured servants received land upon completion of service.⁵⁵ Eventually, however, the colonies turned to either monetary payments or payments in kind by the master.⁵⁶ Although early seventeenth-century indentured servants had a degree of economic mobility, by the eighteenth century such mobility had diminished. For example, according to one study, by 1745 only nine percent of Pennsylvania indentured servants received land and "about 80 percent . . . [were] forced to accept public aid at some point."⁵⁷

Beyond economics, assimilation into colonial life was often difficult. Many indentured servants were essential to colonial life. In Maryland, one Jonathan Boucher claimed that "[a]t least two-thirds of the little education we receive . . . are derived from instructors who are either indentured servants or transported felons."⁵⁸ As one example from a seventeenth-century Maryland defamation suit shows, however, escaping the past of indentured servitude was fraught with difficulties. Elinor Spinkle, a former indentured servant, was called a "whore"; indeed, "the most impudentest" of those who "were brought out of Bridewell and Newgate." It was claimed that she had been seen with

55. See MENARD, *supra* note 49, at 30, 37, 57. Indentured servants in seventeenth-century Virginia shared similar upward mobility. See BALLAGH, *supra* note 24, at 83-87. In seventeenth-century Pennsylvania, about one-third received land, albeit a number received only subsistence quantities. SALINGER, *supra* note 30, at 45. For a study of seventeenth-century servant mobility in South Carolina that suggests similar conclusions of upward mobility, see AARON M. SHATZMAN, *SERVANTS INTO PLANTERS: THE ORIGIN OF AN AMERICAN IMAGE: LAND ACQUISITION AND STATUS MOBILITY IN SEVENTEENTH-CENTURY SOUTH CAROLINA* (1989).

56. In 1715, Maryland required:

every man servant shall, at such time of expiration of his servitude as aforesaid, have allowed and given him one new hat, a good suit; that is to say, coat and breeches, either of kersey or broad cloth, one new shirt of white linen, one new pair of French fall shoes, and stockings, two hoes and one axe, and one gun of twenty shillings price

Women servants received petticoats, aprons, caps, and, instead of a gun, "three barrels of Indian corn." For servants who did not receive their freedom dues or were subject to ill treatment, the statutes assured judicial redress. However, most statutes also provided penalties for frivolous suits. An ACT relating to Servants and Slaves, ch. XLIV (April 1715) 1 LAWS OF MARYLAND, 1692-1799 n.p. (William Kilty ed., 1799-1800); see An Act concerning Servants and Slaves, ch. XLIX (October 1705), 3 THE STATUTES AT LARGE . . . OF VIRGINIA, *supra* note 45, at 448-51; MORRIS, *supra* note 23, at 393-99, 470-510; SMITH, *supra* note 28, at 238-41.

57. SALINGER, *supra* note 30, at 132.

58. JERNEGAN, *supra* note 34, at 53.

"her Coates up to her middle & that Rogue Tom Hughes with his breeches down." Her husband did not dispute that she was an imported convict. He argued, however, that she had "been almost five years in this Country without the least blemish of Immodesty . . . and that her education & former life in England being known to divers in this Country to be none other than honest, modest & Civil."⁵⁹

Over time, awareness of indentured servitude decreased as the institution came to play less of a role in transatlantic passages. Bernard Bailyn writes, "by the time of the American Revolution the indenture system had ceased to be quantitatively important in any part of British America."⁶⁰ For those entering the nation, however, indentured servitude was still a viable means of transport. On the eve of the Revolution, the English Register of Emigrants, 1773-1776 reveals that "more than 4 out of 5 of the emigrants" to Maryland, Pennsylvania, and Virginia were indentured servants.⁶¹ Another author calculates, the "overall incidence of servitude among British subjects arriving in Philadelphia in 1773 was 29 percent and among Germans arriving between 1785 and 1804 was 45%."⁶² A conservative estimate provides that "indentured servants comprised about 38% of those immigrating to the mainland colonies in the early 1770s."⁶³ Even the American Revolution did not end the institution of indentured servitude. Although the general decline in immigration because of European and American conflicts disrupted the importation of indentured servitude, the indentured servitude trade began again after 1815. In 1819, however, it suddenly declined.⁶⁴ By the mid-1830s, Robert Steinfeld asserts, no "European indented servants remained in the United States."⁶⁵

Reasons for the disappearance of indentured servitude abound. The combination of a series of economic depressions, interruptions of transatlantic shipping, and a cultural discomfort about white bound labor seems the most persuasive explanation.⁶⁶ And one should not overemphasize the consequences of the disappearance of indentured servitude. As Christopher

59. PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND: JANUARY 1637/8-SEPTEMBER 1664, ARCHIVES OF MARYLAND 516-17 (William Hand Browne ed., 1883).

60. BAILYN, *supra* note 30, at 208-10.

61. Miller, *supra* note 31, at 140.

62. Grubb, *supra* note 28, at 337.

63. *Id.* at 317 n.2.

64. STEINFELD, *supra* note 23, at 11. He notes that as late as 1785-1804, forty-five percent of German immigrants in Philadelphia were redemptioners.

65. STEINFELD, *supra* note 23, at 11.

66. A further discussion of reasons for the decline can be found in *infra* part IV, B & C.

Tomlins suggests, for many so-called "free" workers, their own labor power remained in reality a property right, a commodity in the employment relationship that they did not control.⁶⁷ Nonetheless, the erasure of white bound labor permitted the growth of a cultural dichotomy between "free labor" and a race-based slavery.⁶⁸

III. INDENTURED SERVANTS ARE ARTICLES OF COMMERCE

Indentured servitude was both a labor relationship and a way of moving people from Great Britain and Europe to British North America. Indentured servants were simultaneously individuals who increased population and a pool of bound labor. They were considered a commodity; their movement was part of a transatlantic commerce. This part begins by examining statutory language and historical accounts to show that the transportation of indentured servants was generally perceived as a commerce of "imported" persons. The second section demonstrates that the legislation that regulated this transport by encouraging or discouraging the entry of imported indentured servants employed measures that were typically used to regulate commerce. The last section argues that even as the late eighteenth-century turned to protect "passengers," the legislation continued to betray the perception that the passengers were imported articles of commerce.

A. Transportation of Indentured Servants as a Commerce

1. The Cultural Perception of the Commerce

To the merchants involved, the transportation of people was a trade, and a most profitable one. Many importers of ordinary indentured servants were "regular agencies"; others transported on consignment or single ventures. Henry Gemery notes that "an active set of agents and masters . . . recruited, indentured, transported, and sold servants overseas."⁶⁹ The trade provided a full ship for every voyage as indentured servants could fill up space not already filled by material goods. As one South Carolina importer wrote in 1755: "The Palatine Trade to America being stopped will deprive us of many Ships that Constantly resorted there & have been the Chief means for Years past of keeping down our Freights."⁷⁰ For others, it was the convict trade

67. See TOMLINS, *supra* note 23, at 260-61.

68. See STEINFELD, *supra* note 23, at 121-46.

69. Gemery, *supra* note 18, at 48.

70. LETTER BOOKS OF HENRY LAURENS, MERCHANT (1746-1783), at 116, *quoted in* WARREN B. SMITH, WHITE SERVITUDE IN COLONIAL SOUTH CAROLINA 53 (1961); see James Hamilton Alexander, *White Indentured Servitude: An American Economic*

that promised the greatest profit. One merchant wrote to his partner that "their business if properly managed will in a few years make Us very genteel fortunes. The Sales of the Convicts run up amazingly in a little time."⁷¹ Nonmerchants saw the trade as an investment opportunity—"the degree of small scale participation is striking."⁷² As Bernard Bailyn points out, by the 1770s,

so many merchants took an occasional small 'adventure' transporting a few indentured servants, and so many commercial vessels accommodated a few free workers as paying passengers that the commerce in the transfer of labor fades indistinguishably into commerce and shipping in general.⁷³

For England's commercial culture, indentured servants were just one more profitable article of commerce.

Some contemporary observers who recognized that indentured servants were articles of commerce, imported for sale, spoke from experience. James Revel described in poetic form his transport as an indentured servant in the late seventeenth century:

Our faces shav'd, comb' out our wigs and hair,
That we in decent order might appear,
Against the planters did come down to view,
How well they lik'd this fresh transported crew.
The Women separated from us stand,
As well as we, by them for to be view's;
And in short time some men up to us came,
Some ask'd our trades, and others ask'd our names.
Some view'd our limbs, and other's turn'd us round
Examining like Horses, if we're sound,
What trade are you, my Lad, says one to me,
A Tin-man, Sir, that will not do, says he[.]

Experience 77-84 (1970) (unpublished Ph.D. dissertation, University of Houston); Farley Grubb, *Redemptorier Immigration to Pennsylvania: Evidence on Contract Choice and Profitability*, 46 J. ECON. HIST. 407-18 (1986).

71. Letter from William Stevenson to James Cheston, December 30, 1769, quoted in EKIRCH, *supra* note 44, at 77, 70-86. "As late as 1765, one Philadelphia merchant was remarking that 'the chief articles that answer here from Ireland which can be bought are Linnens . . . Beef, Butter, Men, Women & Boy Servants.'" STEINFELD, *supra* note 23, at 89.

72. Gemery, *supra* note 18, at 47; see Souden, *supra* note 33, at 29.

73. BAILYN, *supra* note 30, at 297. Bailyn describes in detail the commercial aspects of the trade. *Id.* at 271-352. "Large shiploads of indentured servants" may have produced "net profits" of £650 to £700. *Id.* at 344.

Some felt our hands and view'd our legs and feet,
And made us walk, to see we were compleat;
Some view'd our teeth, to see if they were good,
Or fit to chew our hard and homely Food.

If any like our look, our limbs, our trade,
The Captain then a good advantage made;
For they a difference made it did appear.
Twixt those for seven and for fourteen year.

Another difference there is alow'd,
They who have money have most favour show'd;
For if no cloaths nor money they have got,
Hard is their fate, and hard will be their lot.

At length a grim old Man unto me came,
He ask'd my trade, and likewise ask'd my name;
I told him I a Tin-man was by trade,
And not quite eighteen years of age I said.

Likewise the cause I told that brought me there,
That I for fourteen years transported were,
And when he this from me did understand,
He bought me of the Captain out of hand.⁷⁴

Almost a century later, little had changed. John Harrower who kept a diary of his experience as an indentured servant noted:

Munday 16th May 1774

This day severalls came on board to purchase serv[an]ts. Indentures and among them there was two Soul drivers. They are men who make it their [business] to go on board all ships who have in either Servants or Convicts and buy sometimes the whole and sometimes a [parcel] of them as they can agree, and then they drive them through the Country like a [parcel] of Sheep [until] they can sell them to advantage, but all went away without buying any.⁷⁵

Other observers spoke out of concern over the sale of white English and Irish servants. A letter reprinted in a New York paper in 1775 stated:

74. James Revel, *The Poor Unhappy Transported Felon's Sorrowful Account of his Fourteen Years Transportation at Virginia in America*, in *THE OLD DOMINION IN THE SEVENTEENTH CENTURY: A DOCUMENTARY HISTORY OF VIRGINIA 1606-1689*, at 137-39 (Warren M. Billings ed., 1975). Almost the same poem is discussed as written by a James Lawson in JOHN VAN DER ZEE, *BOUND OVER: INDENTURED SERVITUDE AND AMERICAN CONSCIENCE* 69-80 (1985).

75. *THE JOURNAL OF JOHN HARROWER, AN INDENTURED SERVANT IN THE COLONY OF VIRGINIA, 1773-1776*, at 39-40 (Edward Miles Riley ed., 1963).

Every year certain merchants and owners of vessels in Great Britain and Ireland send over loads of mechanics and labouring people of both sexes, whom by art and falsehood, they persuade to indent themselves for 4 or 5 years for their passage, and when they get them here sell them for slaves at public sale, or barter them for country produce.⁷⁶

The surveyor of customs at Annapolis noted that if "the particulars of this iniquitous traffic [were] universally divulged, those who have established offices in London . . . for the regular conduct of this business would be pointed out to obloquy."⁷⁷ On the other side of the Atlantic, George Gardiner worried about the outflow of men to the colonies: "'Tis dishonourable, in that we are upbraided by all other Nations that know that trade for selling our own Countrymen for the Commodities of those places."⁷⁸

The statutes written by colonial legislatures reflected this perception that immigrants were articles of commerce. In regions with a substantial trade in indentured servants—the Chesapeake and the South⁷⁹—statutes often referred to the indentured servants as commodities or discussed their regulation alongside the regulation of other commodities. For example, Virginia statutes in the 1630s and 1640s stated that the master of the ship must present a list of persons brought on the ship "for the prevention of forestalling the market and ingrossing of commodities."⁸⁰ A 1642 statute forbade the sale of "goods or servants" by the shipmaster before arriving at James City port.⁸¹ In 1695, a Jamaica statute discussed the importation of both wine and people.⁸² A similar grouping can be found in a 1718 Maryland statute that

76. ETHERINGTON'S NEW YORK CHRONICLE, Jan. 27, 1775, *quoted in* Mellor, *supra* note 35, at 70.

77. Mellor, *supra* note 35, at 70 (quoting WILLIAM EDDIS, LETTERS FROM AMERICA . . . COMPRISING OCCURRENCES FROM 1769 TO 1777, at 76 (1792)).

78. Souden, *supra* note 33, at 19, 23 (quoting G. GARDINER, A DESCRIPTION OF THE NEW WORLD, OR, AMERICA ISLANDS AND CONTINENT 8 (London 1651)).

79. In these regions, statutes relating to immigrants were statutes relating to indentured servants. Regions are discussed in which some statutes appear addressing immigrants who were not indentured servants in part III.A.2.

80. Act XXVIII (February 1631-1632) 1 THE STATUTES AT LARGE . . . OF VIRGINIA, *supra* note 45, at 166; *see* Act XXIII (September 1632), *id.* at 190-92.

81. Act VII (March 1642-1643), *id.* at 244-46.

82. An Act to Reimburse their Majesties Treasury, and Encourage Their Subjects to Come and Settle in this Island, THE CONTINUATION OF THE LAWS OF JAMAICA PASSED BY THE ASSEMBLY . . . 1695, at 42-47 (London: Printed for Charles Harper, 1698).

used the language of importation to refer together to "Several Sorts of Liquors," "Negroes," "Irish Servants," and "Irish Papists."⁸³

Even more typical was the extension of the language of commerce—"imported" and "importers"—to indentured servants and their transport to the colonies. In 1642-1643, a Virginia statute set the time of service for "servants as shall be imported haveing [sic] no indentures."⁸⁴ In 1699, a poll was laid on "servants and slaves imported" into the province with the sum to be paid by "the importer."⁸⁵ By 1727, Maryland statutes linked "servants" to the phrase "imported into this province."⁸⁶ A 1729 Pennsylvania act concluded that an earlier act for "preventing the importation of persons convicted of heinous crimes," needed to be strengthened to "discourage the great importation and coming in of numbers of foreigners and of lewd, idle and ill-affected persons." To this end, "all masters of vessels, merchants or others who shall import or bring . . . any Irish servant or passenger upon

83. An Act laying an Imposition on Negroes, and on Several Sorts of Liquors imported, and also on Irish Servants, to prevent the Importing two [sic] great a Number of *Irish Papists* into this Province, THE LAWS OF THE PROVINCE OF MARYLAND 166-69 (reprint ed. 1978) (1718).

84. Act XXVI (March 1642-1643), 1 THE STATUTES AT LARGE . . . OF VIRGINIA, *supra* note 45, at 257.

85. An act for laying an imposition upon servants and slaves imported into this country, towards building the Capitoll [sic], act XII (April 1699), 3 THE STATUTES AT LARGE . . . OF VIRGINIA, *supra* note 45, at 193-95. For other examples, see An act continuing the acts laying impositions . . ., Act V (August 1701), *id.* at 212-13; An act for raising a publick revenue . . . (October 1705), *id.* at 346-48; An Act concerning Servants and Slaves, ch. XLIX (October 1705), *id.* at 447-49; An act for raising a Public Revenue, ch. V (October 1710), *id.* 490, 492-93; An Act concerning Servants, and Slaves, ch. XIV (October 1748), 4 THE STATUTES AT LARGE . . . OF VIRGINIA, *supra* note 45, at 547-48.

The acts of 1650s and 1660s alternated between using "imported" and "coming in." See Servants how long to serve, Act XCVIII (March 1661-1662), 2 THE STATUTES AT LARGE . . . OF VIRGINIA, *supra* note 45, at 113; Servants bringing in goods . . ., Act II (December 1662), *id.* at 164-65.

86. An Act directing the payment of fees arising due on the prosecution of white servants which shall hereafter be imported into this province, ch. II (October 1727), 1 LAWS OF MARYLAND, 1692-1799 n.p. (William Kilty ed., 1799-1800). Maryland statutes in 1728 and 1750 also referred to "imported" servants. See An ACT . . . to explain an act, entitled, An act for laying an additional duty of twenty shillings . . . on all Irish servants being papists, to prevent the growth of popery by the importation of too great a number of them into this province . . ., ch. VIII (October 1728), *id.* at n.p.; An ACT to remedy some evils relating to servants, ch. V (May 1750), *id.* at n.p.

The 1715 Maryland Act concerning indentured servants referred to "all servants transported into this province" and to "servants imported into this province." An ACT relating to servants and slaves, ch. XLIV (April 1715), *id.* at n.p.

redemption" had to pay twenty shillings for each indentured servant.⁸⁷ New Jersey, Delaware, North Carolina, and South Carolina also all referred to indentured servants as "imported."⁸⁸ The "imported" language in many colonies continued to appear into the 1750s.⁸⁹

2. An Alternative Cultural Perception

In New England and New York, some colonial statutes referred to immigrants, not as "imported" indentured servants, but as "chargeable" paupers. Statutes from these two regions suggest that in areas where indentured servitude was less prevalent, an alternative cultural perception arose—immigrants might not be articles of commerce. However, the small number of immigrants to these regions and the continual desire for indentured servants in these regions ensured that the vision of immigrants as imported articles of commerce continued relatively undisturbed.

In New England, statutes referring to immigration did not always use the "imported" language and often expressed a desire for removing immigrants. For example, in 1638, New Plymouth required the "Master of a Boate" to "recarry" any passengers who did not have leave of the Governor.⁹⁰ A 1642

87. An Act Laying a Duty on Foreigners and Irish Servants Imported into this Province, ch. CCCVII (May 1729), 4 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 135-40 (James T. Mitchell & Henry Flanders eds., 1896-1911) [hereinafter THE STATUTES AT LARGE OF PENNSYLVANIA, 1682-1801]. For other early Pennsylvania examples, see An Act Imposing a Duty on Persons Convicted of Heinous Crimes and to Prevent Poor and Impotent Persons being Imported into the Province of Pennsylvania, ch. CCCXIV (February 1729-1730), *id.* at 164-71; An Act Imposing a Duty on Persons Convicted of Heinous Crimes Brought into this Province and not Warranted by the Laws of Great Britain, and to Prevent Poor and Impotent Persons being Imported into the same, ch. CCCLIV (February 1742-1743), *id.* at 360-70; An Act for Prohibiting the Importation of Germans or Other Passengers in too Great Numbers in any One Vessel, ch. CCCLXXXI (January 1749-1750), 5 THE STATUTES AT LARGE OF PENNSYLVANIA, 1682-1801, *supra*, at 94-96.

88. See, e.g., An Act for Regulating of White Servants (1714), THE EARLIEST PRINTED LAWS OF NEW JERSEY 1703-1772, at 24-26 (John D. Cushing ed., 1978); An Act imposing a Duty on Persons convicted of heinous Crimes, and to prevent poor and impotent Persons being imported" (n.d.), THE EARLIEST PRINTED LAWS OF DELAWARE, 1704-1741, at 138-44 (John D. Cushing ed., 1978). For North Carolina, THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, 1669-1751 (John D. Cushing ed., 1978). For South Carolina, see An Act for the Encouragement of the Importation of White Servants (1698), 2 THE STATUTES AT LARGE OF SOUTH CAROLINA 153 (1837).

89. See *supra* notes 85, 86, 87.

90. THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 62 (reprint ed. 1986) (1836) [hereinafter THE COMPACT . . . OF NEW

law required inhabitants who "brought over" people who were "apparently likely to be chargeable," and who were objected to, to "discharge the Towne of them."⁹¹ The 1671 law extended this provision so that the "master of any Vessel" had to carry away or provide security for any person identified as chargeable.⁹²

These statutes appeared to focus less on the commerce aspect of immigration than on the financial status of the immigrant. This concern with financial status arose because of the underlying system of poor laws in New England.⁹³ Colonial poor laws, modeled on English laws, required towns to care for impoverished or sick members. Towns consequently were loathe to accept "strangers" who appeared likely to become charges.⁹⁴ This reluctance arose without regard to whether the "stranger" came from another town or another continent.

Immigrants fell within this alternative cultural perception because of the weakness of the indentured servitude trade in New England. The ethnic and religious structure of New England and the lack of large-scale, labor-intensive agricultural enterprises prevented the indentured servant trade from becoming a dominant labor supply.⁹⁵ The general absence of indentured servants, particularly female servants, appears in a 1649 letter to the son of the former Governor of Massachusetts, John Winthrop, Jr. The sender explained that he had sent to Winthrop, one Catherine Lemon, a spinster, as an indentured servant. He added, "though you haue maides inough for praesent yet did not know but some of them might be quickly out of theire times and maids are scarce to come by."⁹⁶ As Timothy Breen notes, "The New England colonies were such notoriously bad markets for indentured servants that something under 2% of the individuals" on two lists of indentured servants "bothered to

PLYMOUTH].

91. *Id.* at 72.

92. *Id.* at 273.

93. Concern over immigrants also arose because of politics or religion. See EMBERSON EDWARD PROPER, *COLONIAL IMMIGRATION LAWS: A STUDY OF THE REGULATION OF IMMIGRATION BY THE ENGLISH COLONIES IN AMERICA* 9-10, 17-20 (1900).

94. See ROBERT W. KELSO, *THE HISTORY OF PUBLIC POOR RELIEF IN MASSACHUSETTS, 1620-1920*, at 30-42, 45-55 (reprint ed. 1969) (1922); Stefan A. Riesenfeld, *The Formative Era of America Public Assistance Law*, 43 CAL. L. REV. 175, 201-14 (1955).

95. See Clifford K. Shipton, *Immigration to New England, 1680-1740*, 44 J. POL. ECON. 225, 232-39 (1936).

96. 5 WINTHROP PAPERS 339, 350-51 (1947). The Pilgrims were, in many respects, indentured servants promising to work for seven years in return for English investors paying their passage.

go there."⁹⁷ But the low figure of indentured servants was representative of generally low figures of immigrants to colonial New England. So few immigrants came to New England after the 1630s and 1640s⁹⁸ that population models for seventeenth century New England assuming a population "closed to migration" have been considered "close" to accurate.⁹⁹

New England was not happy about the absence of indentured servants. In 1701, Boston "urged the General Court to promote the importation of white servants" to "fight Indians and eventually become free to plant new towns and raise up families."¹⁰⁰ In 1708, a law "to Encourage the Importation of White Servants" offered forty shillings a head to each master of a vessel or merchant who imported male servants between eight and twenty-four years of age.¹⁰¹ Moreover, the poor laws actually sought to guarantee investment in immigrant indentured servants. A 1642 Massachusetts statute stated that if an inhabitant "shall bring over a servant from England or els where [sic] . . . which by Gods Providence shall fall diseased lame or impotent by the way or after they come here," the town would maintain the servant after the term of service expired.¹⁰² Similarly, in eighteenth-century Boston, under the poor laws, "immigrants were allowed to remain if they were able-bodied tradesmen, indentured servants, or the possessors of £50."¹⁰³ The poor laws weeded out only those immigrants who were judged incapable of any productive activity

97. Breen, *supra* note 22, at 190 n.2.

98. The substantial immigration during these years is referred to as the "Great Migration." Breen suggests that over the twelve-year period at least 15,000 English ventured to New England. *See id.* at 222.

99. MCCUSKER & MENARD, *supra* note 26, at 216; *see* Shipton, *supra* note 95, at 225.

100. Shipton, *supra* note 95, at 229.

101. An Act to Encourage the Importation of White Servants (1708-9), 1 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 634 (Boston ed. 1869) [hereinafter ACTS AND RESOLVES]. Those bringing in "Indian slaves" and "negro's" had to pay a duty.

102. THE COMPACT . . . OF NEW PLYMOUTH, *supra* note 90, at 72. The 1671 statute was similar but applied only if the "covenant servant" was "sound and well." *Id.* at 273. Massachusetts laws on the admission of town inhabitants in 1700 had a similar structure except required a list of passengers to be sent to the towns. An Act directing the Admission of Town Inhabitants (1700-1), 1 ACTS AND RESOLVES, *supra* note 101, at 451-53. Early statutes also required masters to give servants land out of their own property. *See* "Lands to Servants" (1636), THE COMPACT . . . OF NEW PLYMOUTH, *supra* note 90, at 47; *see also id.* at 36, 58, 65; "Strangers, Sojourner, and Servants" (1656) and "Masters, Servants, Sojourners" (1672), THE EARLIEST LAWS OF THE NEW HAVEN AND CONNECTICUT COLONIES 1639-1673, at 52, 121-22 (John D. Cushing ed., 1977).

103. Shipton, *supra* note 95, at 239.

by colonial standards.¹⁰⁴ Despite these efforts to support the trade, and although a general increase occurred in the importation of English and Irish indentured servants in the early eighteenth century, the trade never became well-established in New England.¹⁰⁵

The alternative cultural perception of immigrants as potential paupers that appeared in the poor laws did not alter the dominant cultural perception that immigrants were articles of commerce. The possibility of the poor laws' application to immigrants arose because indentured servitude turned potential immigrant paupers into a labor force and, where indentured servitude was weak, immigrant paupers might remain paupers. In reality, the poor laws probably only applied to the few immigrants who were unable even to indenture themselves. Despite the small numbers of immigrants and indentured servants, the statutes recognized the existence of the commerce in indentured servants and admitted, perhaps even favored, the possibility that immigrants could be articles of commerce.

New York reinforces the theory that the existence of statutes defining immigrants in ways other than "imported" did not displace the general cultural perception that immigrants were articles of commerce. New York—bounded on one side by New England's lack of large demand for indentured servants and on the other by the Chesapeake and Virginia's participation in it—passed statutes that represented incoming persons as potential paupers but also those that referred to immigrants as "imported." The colony wanted indentured servants. In 1712, 1757, and 1766 New York passed statutes using "imported" designed to encourage the importation of indentured servants—but to no avail.¹⁰⁶

New York, indeed, like New England, experienced little early transatlantic immigration. Contemporary comments from the late seventeenth century recount few settlers arriving in New York.¹⁰⁷ Statutes that used language other than that of "importation," appear to have referred to a fear over intercolonial migration. For example, a 1721 act "to prevent Vagrant and Idle Persons from being a Charge" referred to persons "transported" and persons

104. See An Act in addition to the Act directing the Admission of Town Inhabitants . . . , ch. 5 (1722-23), 2 ACTS AND RESOLVES, *supra* note 101, at 244-45 (1874).

105. Shipton, *supra* note 95, at 232. For a discussion of importation into Massachusetts, see Towner, *supra* note 30.

106. See MCKEE, *supra* note 30. See part B for discussion.

107. The population relied on its Dutch original settlers and indentured servants and later friends of the Duke of York. See MARCUS LEE HANSEN, *THE ATLANTIC MIGRATION, 1607-1830*, at 36, 38, 39 (1940); MALDWYN ALLEN JONES, *AMERICAN IMMIGRATION 12-14* (2d ed. 1992); Ernst van den Boogaart, *The Servant Migration to New Netherland, 1624-1664*, in *COLONIALISM AND MIGRATION: INDENTURED LABOUR BEFORE AND AFTER SLAVERY* 55-75 (P.C. Emmer ed., 1986).

"imported" when requiring shipmasters to return people likely to be a burden or post bond.¹⁰⁸ The people who were referred to as "transported" appeared to be fleeing the Caribbean and other colonies.

WHEREAS Several Idle and Necessitous Persons come or are brought into this Province from the Neighbouring Colonys & Plantations, or Some of his Majesties Plantations, who have either Fled from thence for fear of punishment for their Crimes, or being Slothful and unwilling to Work, have Contracted Debts, and to avoid the payment of them, Transported themselves into this Province, Verry often to the great Damage of the Persons so Transporting them, as well as charge & Trouble to the Places, into Which they come, or are brought, by reason of their lurking Privately in Cities, or in Places in the Counties remote from the habitations of Justices of the peace.¹⁰⁹

108. An Act to prevent Vagrant and Idle Persons from being a Charge and Expence to any [of] the Counties, Cities[,] Towns, Mannors or Precincts within this Province, ch. 410 (July 1721), 2 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 56-61 (1896) [hereinafter THE COLONIAL LAWS OF NEW YORK]. The act was similar to a 1683 version aimed at "the prevention and discourageing of Vagabonds and Idle persons to come into this province from other parts, and also from one part of the Province to another." An Act for the Defraying of the publique & necessary Charge of each respective City, towne and County throughout this Province & for maintaining the poore, & preventing vagabonds, ch. 9 (November 1683), 1 THE COLONIAL LAWS OF NEW YORK, *supra*, at 131-32.

109. An Act to prevent Vagrant and Idle Persons from being a Charge and Expence to any [of] the Counties, Cities[,] Towns, Mannors or Precincts within this Province, ch. 410 (July 1721), 2 THE COLONIAL LAWS OF NEW YORK, *supra* note 108, at 57. This act, like the poor laws in New England, required the shipmaster to provide lists of passengers and security for persons unqualified to remain. Similar acts in 1683 and 1691 required masters of vessels to present within twenty-four hours "a list of all such passengers hee [sic] brings into this Province with their Qualities & Conditions." If "any vessell bring in any person not qualified as aforesaid, nor able to give security for their well demeanor," the shipmaster had to transport them out of the province. An Act for the Defraying of the publique & necessary Charge, *supra* note 108, at 133; An Act for the defraying of the Publique & necessary charge throughout this Province and maintaining the poor and preventing Vagabonds, ch. 6 (May 1691), *id.* at 237. The 1691 act was repealed in 1701 "[e]xcept so much thereof as relates to Vagabonds." An Act for Repealing an Act . . . , ch. 96 (October 1701), *id.* at 456-58. Despite the shipmaster's remedies, the shipmaster was forced to put up fifty pounds of security or to transport the person back. The 1683 act noted that, after "the Custome & practice of his Majestys Realm of England," any person who came had to have "a Visible Estate" or a "manuall craft or occupacon [sic]." If not, before being admitted, the "Inhabitant [must] give sufficient Security thatt hee shall nott bee a burthen or charge [sic]." Under the 1721 act, if a stowaway did not have a license or could not provide two thousand pounds as security and pay the shipmaster any damages or costs, then

As the Act noted, "persons deeply In-debted in the said Islands and Plantations, find means privately to be Conveyed on board in Casks or Chests without the knowledge of the Master of Such Vessell." These people were not within the standard flow of immigrant commerce. As individuals, they had slipped aboard the ship.

Moreover, in reality, few poor immigrants appear to have entered colonial New York.¹¹⁰ In fact, one recorded instance of poor immigrants flooding New York actually was an example of indentured servitude. In 1710, the British government agreed to transport 2800 refugees, originally from the Palatine, out of England where they were living in encampments on the outskirts of London. Most of the passengers were sent as indentured servants of the British government to manufacture naval stores in New York.¹¹¹

Although statutes in northern regions referred to immigrants in ways that seem to suggest that incoming persons were not always seen as articles of commerce, these regions received comparatively few immigrants—and even fewer indentured servants—prior to the American Revolution. Moreover, even in these regions, local legislatures attempted to encourage importation. The very existence in these areas of statutes referring to persons as "imported," establishes the breadth of the cultural perception that most immigrants were articles of commerce.

B. Entry Regulated as Commerce

If most immigrants were indentured servants, and indentured servants were articles of commerce, then their entry into British North America was to be regulated as a commerce. And, as with any commerce, the colonies tried to

the stowaway would be kept in custody and returned to the island or plantation. The act authorized shipmasters to seize such persons.

110. RAYMOND A. MOHL, *POVERTY IN NEW YORK: 1783-1825*, at 42 (1971).

111. ROBERT E. CRAY JR., *PAUPERS AND POOR RELIEF IN NEW YORK CITY AND ITS RURAL ENVIRONS, 1700-1830* (1988); KNITTLE, *supra* note 41, at 131. For a full account of the British government project, see *id.* at 111-224. New York forced those who survived the voyage to land, not in Manhattan, but at Governor's Island. *Id.* at 148. The indentured servitude system transformed the poor into useful labor as even the children were quickly indentured. The numbers of poor immigrants entering New York without being indentured servants appears to have been quite small. Prior to the mid-eighteenth century, statistics suggest that New York's poor were few. In 1700, the list of permanent poor in a city of 5,000 amounted to 35. In 1735, with a population almost doubled, adult paupers were listed at 55. See MOHL, *supra* note 110, at 42-43.

control importation. Consistent with the belief that immigration involved a commerce, regulation did not focus on the people entering, but on the merchants who imported them. For the most part, the laws encouraged and discouraged importers, not individual immigrants.

1. Encouraging Importation

Many colonies, at some point in the colonial period, attempted to encourage the importation of indentured servants by paying the importers. In the early seventeenth century, a number of colonies gave land to the importer. For example, in Virginia, a "headright" of fifty acres was offered to those who would import people.¹¹² Money gradually replaced land. In New England where the trade in indentured servants never seemed to catch on, Massachusetts in 1708-1709 offered forty shillings for each white male indentured servant "import[ed]."¹¹³ Several years later, South Carolina agreed to pay twenty-five pounds for every indentured servant and twenty-two pounds for boys between twelve and sixteen. The colony's stated rationale was to increase the white population to defend against "Indian enemies" and to mitigate the increase in "slaves."¹¹⁴ Between 1696 and 1741, South Carolina passed ten similar statutes attempting to encourage settlement.¹¹⁵

New York sought to encourage importation by making certain laws that would support the trade. In 1712 and 1757, New York's governor tried unsuccessfully to have legislation passed encouraging the importation of white servants. Finally, in 1766, New York passed a law that openly proclaimed the colony's desire for poor protestant immigrants. The preamble stated, "WHEREAS the Emigration of Protestants from Europe hath conduced greatly to the Settlement of this Colony, and doubts have arisen tending to the discouragement of further Importations of poor Persons." The act's provisions ensured that importing indentured servants would give the importer a legal profit. The statute affirmed that contracts for service would bind an infant or adult, that indentured servants were assignable, and that children could be bound beyond twenty-one if necessary "to raise Money for the payment of their passages."¹¹⁶

112. Act LVII (March 1642-1643), 1 THE STATUTES AT LARGE . . . OF VIRGINIA, *supra* note 45, at 274. For a general discussion of the headright system in the different colonies, see HANSEN, *supra* note 107, at 29-31, 37-38, 40-44.

113. An Act to Encourage the Importation of White Servants, ch. II (February 1708-1709), 1 ACTS AND RESOLVES, *supra* note 101, at 634.

114. AN ACT to encourage the importation of white Servants into this Province (1716), 2 THE STATUTES AT LARGE OF SOUTH CAROLINA 646-49 (1837).

115. See PROPER, *supra* note 93, at 69.

116. An Act for the Regulation of Servants, ch. 1306 (December 1766), 4 THE

One of the most unusual statutes is from Jamaica. The Jamaican government in 1695 decided to encourage settlement. For British and European immigrants—excepting "Jews, Cripples, and children under Eleven"—the act promised that the government would pay ship captains for the person's passage. The person would be "Free from a manner of Servitude." To accomplish this end, the act required masters to present a list of passengers. Despite the result of freeing the incipient indentured servant, the act nonetheless was aimed at the importer. The shipmaster received money for "personal use" depending on the passenger's origin: more for the passengers of Scottish, English, and European origin; one pound less for those from Ireland.¹¹⁷

The colonies encouraged the immigration of white Europeans and British for a variety of reasons—often to provide labor or alter regional racial composition. But regardless of motivation, the colonies' efforts were aimed, not at the immigrant, but at the importing shipmaster. With a commerce, the best encouragement was to ensure that there would be money to be made in the importing venture.

2. Discouraging Importation

If, at times, the colonies tried to encourage importation, at other times, they sought to discourage the importation of certain categories of indentured servants based on ethnicity, religion, age, health, and past behavior. Revealing once again the perception that the importation was a commerce, these acts did not bar the individuals from entering. Instead, they tried to make the trade in these categories of people less profitable. Duties were one popular device.

Irish indentured servants were the subjects of many such duties. For example, Virginia chose in 1699 to help build a capitol by a fifteen shilling duty on "every servant not born in England or Wales."¹¹⁸ Maryland passed

COLONIAL LAWS OF NEW YORK, *supra* note 108, at 924; *see* MCKEE, *supra* note 30, at 94.

117. An Act to Encourage Their Subjects, THE CONTINUATION OF THE LAWS OF JAMAICA PASSED BY THE ASSEMBLY . . . 1695, at 45-46 (London: Printed for Charles Harper, 1698).

118. An act for laying an imposition upon servants and slaves imported into this country, towards building the Capitoll [sic], Act XII (April 1699), 3 THE STATUTES AT LARGE . . . OF VIRGINIA, *supra* note 45, at 193. The laws may not have been designed to completely bar Irish Catholics. The Virginia law suggests that, at times, the laws placing duties upon Irish servants may have been less concerned with the spread of popery than with the desire to raise money and the fear that the English would not tolerate duties on English servants. For example, Virginia's policy towards the Irish frequently changed. In 1657, it required Irish servants without indentures to serve six years, a period longer than white protestant indentured servants. However,

acts that placed "an additional duty of twenty shillings" on "all Irish servants being papists, to prevent the growth of popery by the importation of too great a number of them."¹¹⁹ In 1729, a Pennsylvania act required:

all masters or vessels, merchants or others who shall import or bring into any port or place within this province any Irish servant or passenger upon redemption, or on condition of paying for his or her passage upon or after their arrival in the plantations, shall pay for every such Irish servant or passenger upon redemption as aforesaid the sum of twenty shillings.

Indeed, to stop "masters of vessels, merchants and others trading into this province" from avoiding paying duties by landing the Irish in "adjacent governments," the act authorized any Irish indentured servants found within a year of their importation to be questioned as to how they had entered the province. The offending merchant then was compelled to pay twenty pounds per person.¹²⁰

The importation of convicts brought similar duties to be paid by the shipmasters. The British government prohibited such duties.¹²¹ The

within three years of passage, Virginia repealed the law because it appeared to "discourage[]" them "from coming into the country, And by that means the peopling of the country retarded." An Act for repealing an Act for Irish Servants, Act XIV (March 1659-1660), *id.* at 538-39.

119. An ACT to supply some defects in the act, entitled . . . , ch. VIII (October 1728), 1 THE LAWS OF MARYLAND, 1692-1799 n.p. (William Kilty ed., 1799-1800) (referring to a similar 1717 act).

120. An Act Laying a Duty on Foreigners and Irish Servants Imported into this Province, ch. CCCVII (May 1729), 4 THE STATUTES AT LARGE OF PENNSYLVANIA, 1682-1801, *supra* note 87, at 135-40; *see* An Act Imposing a Duty on Persons Convicted of Heinous Crimes and to Prevent Poor and Impotent Persons being Imported into the Province of Pennsylvania, ch. CCCXIV (February 1729-1730), *id.* at 164-71; An Act to prevent Vagrant and Idle Persons from being a Charge and Expence to any [of] the Counties, Cities [,] Towns, Manners or Precincts within this Province, ch. 410 (July 1721), 2 THE COLONIAL LAWS OF NEW YORK, *supra* note 108, at 61.

121. When the convict trade was conducted by the British on an informal basis, Virginia and Maryland passed legislation banning convict importation. For Pennsylvania's 1683 proposal, *see* HERRICK, *supra* note 30, at 121. For Maryland's 1676 act, *see id.* at 118. For Virginia's 1671 attempt, *see* 2 THE STATUTES AT LARGE . . . OF VIRGINIA, *supra* note 45, at 509; MORGAN, *supra* note 25, at 236. *See generally* PROPER, *supra* note 93, at 61, 65. With the passage of the British 1718 transportation act, the colonists could no longer bar the trade. An act for the further preventing robbery, burglary, and other felons, and for the more effectual transportation of felons. . . , 4 George I, ch. 11 (1718). The colonies continued undeterred, however, to pass legislation relating to convicts.

colonies, however, manipulated the technicalities of Privy Council review to keep the legislation in force. Laws were sent to England for review at the last possible moment and only after passing new legislation. For example, in Pennsylvania, delays, amendments, and ancient unrepealed laws kept the convict measures in force.¹²² The status of convict laws became sufficiently

122. Pennsylvania's numerous acts imposing duties and bonds on convicts provide a typical example. When the British government began to advise repeal, the colony took refuge in the rule that laws considered by and not acted on by the Privy Council within six months of arrival were valid. Pennsylvania delayed sending such laws to England until the last possible moment and then only after passing new regulations.

In 1721-1722, Pennsylvania passed an act requiring a five-pound duty per convict before landing and a fifty-pound bond posted to ensure security. An Act for Imposing a Duty on Persons Convicted of Heinous Crimes and Imported into this Province as Servants, or Otherwise, ch. CCXLVIII (May 1722), 3 THE STATUTES AT LARGE OF PENNSYLVANIA, 1682-1801, *supra* note 87, at 264-65. The act was followed in 1728 and 1729-1730 by acts prohibiting the landing of convicts in adjacent territories with the intent that they journey to Pennsylvania. In 1731, Royal Instructions to the Governor ordered that the convict laws not be approved; however, the Governor ignored them. Such legislation continued to be passed throughout the 1730s and the colony became notoriously slow in sending it to England. *See* HERRICK, *supra* note 30, at 123-31. In February 1738-39, the Privy Council considered the 1738 duty and security on convicts. The report to the Privy Council advised repeal. It added:

according to the limitations of the patent. . . the proprietary of Pennsylvania is obliged to transmit all laws passed in that province within the space of five years after they shall have been enacted. . . but the Crown has reserved to itself only the space of six months for considering of such laws after their transmission, and if no decision is made thereupon by His Majesty during that time, they acquire the same force as if they had been confirmed.

Given the distinct advantage to the proprietary, the report suggested that Pennsylvania should engage to "be more punctually [sic]. . . in such transmission." The report noted that in the case of the convict legislation, the laws "have not been regularly transmitted." Perceiving the colony's plan, the report explained that the laws therefore "are sometimes prolonged, altered or amended even after the time fixed for laying them before His Majesty." By this method of "renewing a law after it has remained four years or longer in force they may perpetuate laws to the detriment of the prerogative and of the interest of Great Britain." Report to the Lords of the Committee of Council (February 21, 1738-1739), 4 THE STATUTES AT LARGE OF PENNSYLVANIA, 1682-1801, *supra* note 87, at 466-68.

Not all the colonies continued to fight. Maryland's attempts to discourage the trade in the 1720s were disallowed by the Board of Trade. In 1725 the governor of Maryland recognized that so long as the colonists were willing to purchase the convicts, they would be imported. *See* HERRICK, *supra* note 30, at 118 n.22; JERNEGAN, *supra* note 34, at 53. Although Maryland did attempt to impose a duty on convict importation, a 1751 Maryland act recognized the presence of imported convicts

confusing that the Privy Council eventually approved an act establishing the post of collector of duties on felons, while it continued to disapprove the actual duties.¹²³ These attempts to discourage convicts were recognized as interference with a commerce by British Attorney General William Murray in a 1775 opinion on Maryland's law. He concluded that such laws should be repealed or declared null because "[b]y the same reason they might lay a duty or even prohibit British goods."¹²⁴

Although there was "considerable opposition" to the convict trade on "moral grounds," economics may have played the most powerful role in the colonies' desire to exclude the convicts. "Experience had taught the planters that they [the convicts] were hard to control and were liable at any moment to run away."¹²⁵ Much of the convict legislation was designed to inform purchasers as to whether the indentured servant was a convict and to make money from their importation. Some laws required that the shipmaster present to the port official a list of all persons on the ship. The official then returned to the shipmaster a list of those who could be disposed of as indentured servants. Other laws forced the shipmaster to post a bond as security for the convicts' good behavior over the next year.¹²⁶

by making the testimony of "convicts imported into this province" admissible against other convicts in court. An ACT to make the testimony of convicted persons legal against convicted persons, ch. XI (May 1751), 1 LAWS OF MARYLAND, 1692-1799 n.p. (William Kilty ed., 1799-1800).

123. HERRICK, *supra* note 30, at 127. For information related to the Privy Council repeals, see Papers relating to the acts passed by the forty-second assembly . . . , 4 THE STATUTES AT LARGE OF PENNSYLVANIA, 1682-1801, *supra* note 87, at 502-4, 506, 507-8, 510-12.

124. The opinion of the attorney-general Murray. . . , May 6, 1755, in GEORGE CHALMERS, 1 OPINIONS OF EMINENT LAWYERS ON VARIOUS PARTS OF ENGLISH JURISPRUDENCE. . . at 333-36 (Burlington, Vermont ed. 1858). Murray, later to become Lord Mansfield, reviewed the law that placed a duty of forty shillings on imported convicts. He found no authority in any colonial assembly to pass such a law: "I am of opinion that no colony can make such a law, because it seems to me in direct opposition to the authority of the parliament of Great Britain." He noted that the law would force courts to stop ordering the transportation of felons or require the Crown to pay the duty. *Id.*

125. MCCORMAC, *supra* note 49, at 101, 103-4.

126. See legislation listed *supra* notes 118, 119. These methods were similar to those used against the Irish. The importation of the Irish and convicts were linked by Pennsylvania Governor Patrick Gordon in an opening speech to the Assembly on December 17, 1728. See HERRICK, *supra* note 30, at 124.

In Pennsylvania, the effort to protect purchasers of indentured servants included discouraging convicts and "old persons, infants, maimed, lunatic or any vagabond or vagrant persons [that] are imported." The 1729-1730 act required that the importer of such an indentured servant give sufficient security or transport the person out of the province. "For the better discovery" of these persons, the act required the shipmaster to give an account of all the indentured servants or passengers imported to the port collector. The mayor or justices of the peace had to examine each passenger and give a certificate permitting the persons fit to be "landed or disposed of."¹²⁷ In 1742-43, a new version of the statute made explicit that guaranteeing the investment of purchasers of the imported servants was behind much of the attempt to discourage infirm immigrants. The act stated:

And whereas it hath been a practice for masters of vessels, merchants and others, importers of servants into this province, to sell and dispose of such servants as are infirm or afflicted with secret and loathsome diseases and so otherwise disabled as to become useless and burdensome to the purchasers, to the great damage and loss of the purchasers themselves and to the province in general. . . .

By affirming a cause of action for purchasers who bought indentured servants that were "incapable of performing the ordinary or reasonable duties of servants," the statute once again emphasized the perception that immigrants were articles of commerce.¹²⁸

127. An Act Imposing a Duty on Persons Convicted of Heinous Crimes and to Prevent Poor and Impotent Persons being Imported into the Province of Pennsylvania, ch. CCCXIV (February 1729-1730), 4 THE STATUTES AT LARGE OF PENNSYLVANIA, 1682-1801, *supra* note 87, at 164-71. The preamble to the statute stated:

Whereas many persons trading into this province have for lucre and private gain imported, sold or disposed of, and daily do import passengers and servants into this province who by reason of age, impotency or idleness have become a heavy burden and charge upon the inhabitants thereof, and likewise do frequently import divers persons convicted of heinous crimes, who soon after their coming into this province, do often commit many felonies, robberies, thefts and burglaries, to the great hurt of His Majesty's subjects trading to and inhabiting the same.

Id. at 164. The collector and justices each were to be paid nine pence for the service. *Id.* at 169. See also An Act Laying a Duty on Foreigners and Irish Servants Imported into this Province, ch. CCCVII (May 1729), 4 THE STATUTES AT LARGE OF PENNSYLVANIA, 1682-1801, *supra* note 87, at 135-40.

128. An Act Imposing a Duty on Persons Convicted of Heinous Crimes brought into this Province and not Warranted by the Laws of Great Britain, and to Prevent Poor and Impotent Persons being Imported into the same, ch. CCCLIV (February 1742-1743), 4 THE STATUTES AT LARGE OF PENNSYLVANIA, 1682-1801, *supra* note

The 1729-1730 statute is one of the few early colonial statutes to contain a provision directed not at the importer but at the passenger. A provision required a duty of forty shillings to be paid by any "alien born out of the allegiance of the King of Great Britain." Unlike most of the duties discussed, this duty was to be paid by the immigrant. The duty was twice what a shipmaster paid for an imported Irish servant or redemptioner. It is unclear whether the double duty was designed to discourage nonindentured servants or to charge whatever price the legislature believed could be paid.¹²⁹ Regardless of intention, in 1742-1743, the act was repealed. The 1742-1743 act did not require that a passenger pay duties; instead the act authorized the ship owner to recover duties paid on behalf of a passenger. In addition, the act emphasized that it should not be construed to "hinder the importation of such servants or others who. . . can or may be legally imported."¹³⁰ Once again, although a few provisions suggested a perception of immigrants who were not indentured servants, these provisions did not dominate the legal culture long enough to alter the background assumption that many immigrants were imported articles of commerce.

87, at 360, 368-69. Colonial regulation of the indentured servant trade often reached out to embrace other elements of the commerce that lay outside of the colony. In the legal recognition of indentures made or begun outside of the colony, the colonies revealed that they were dealing with a transatlantic and intercolonial trade. For example, in 1715, Maryland recognized that Virginia indentured servants would serve the amount of time that they would have served in Virginia. The same act established that the time of servitude would begin at the "first anchoring of the vessel within this province." But, if the vessel should "tarry" more than fourteen days in Virginia, then the time of service would be reduced by that amount. An ACT relating to servants and slaves, ch. XLIV (April 1715), 1 LAWS OF MARYLAND, 1692-1799 n.p. (William Kilty ed., 1799-1800).

129. An Act Laying a Duty on Foreigners and Irish Servants Imported into this Province, ch. CCCVII (May 1729), 4 THE STATUTES AT LARGE OF PENNSYLVANIA, 1682-1801, *supra* note 87, at 136. Shipmasters importing Irish indentured servants had to pay a twenty shilling duty under a following provision.

130. An Act Imposing a Duty on Persons Convicted of Heinous Crimes brought into this Province and not Warranted by the Laws of Great Britain, and to Prevent Poor and Impotent Persons being Imported into the Province of Pennsylvania, ch. CCCLIV, (February 1742-1743), 4 THE STATUTES AT LARGE OF PENNSYLVANIA, 1682-1801, *supra* note 87, at 365.

C. Initial Efforts to Protect Passengers Regulated as Commerce

Even when colonies began to protect passengers during the voyage, they continued to affirm the trade in indentured servants. Among the colonies, Pennsylvania moved most quickly in the direction of protectionism. Under pressure from the Pennsylvania German Society, Pennsylvania passed statutes in the mid-eighteenth century that sought to reform travel for immigrants. Although these statutes demonstrate a concern with immigrants, they operated within the assumption that the indentured servitude trade would continue as a commerce.

One aspect of the laws aimed to reform the indentured payment system. A 1765 act, directed at the trade in redemptioners, barred the shipmaster from forcing "surviving relations" to pay for a passenger who died or a passenger to pay for transported "relations."¹³¹ Despite the seemingly generous provisions, Pennsylvania actually guaranteed the shipmaster most of the passage fare. The act still required a husband to pay for his dead wife and children, and children to pay for their dead parents. The act also authorized indentures for longer than the regular statutory limit if necessary to pay for the passage. Payment reform did not alter the trade.

Another aspect sought to alleviate the horrors of the passage. In 1750, Pennsylvania passed an act "for prohibiting the importation of Germans or other passengers in too great numbers in any one vessel." The act was directed at the frequent practice "by masters and owners of vessels trading within this province to import" so many people in a boat that disease spread. The act required "good and wholesome [meat], drink and other necessaries" and sufficient space for the passengers.¹³² Some felt that these types of acts

131. A Supplement to the act, Entitled, "An Act For the Prohibiting the Importation of Germans or Other Passengers in too great Numbers in any one Vessel, ch. DXXVII, (May 1765), 6 THE STATUTES AT LARGE OF PENNSYLVANIA, 1682-1801, *supra* note 87, at 432-41. The editors of the statute collection, James Mitchell and Henry Flanders, believed that the 1765 Pennsylvania act had been "allowed to become a law by lapse of time." *Id.* at 440. Another author believed that it had been disallowed by the Privy Council. JERNEGAN, *supra* note 34, at 225 n.30.

132. An Act for Prohibiting the Importation of Germans or other Passengers in too great Numbers in any One Vessel, ch. CCCLXXXI (January 1749-1750), 5 THE STATUTES AT LARGE OF PENNSYLVANIA, 1682-1801, *supra* note 87, at 94-97. The act specified that passengers older than fourteen must have room "at least six feet in length and one foot six inches in breadth," but it permitted two passengers under fourteen to occupy such a space. The following year, Massachusetts passed a similar act. An Act to Regulate the Importation of Germans and Other Passengers coming to Settle in this Province, ch. 12 (February 1750-1751), 3 ACTS AND RESOLVES, *supra* note 101, at 536-37. One early example of passenger legislation appears in Virginia. In 1657-1658, Virginia had a law which required shipmasters to provide four months of

worked against the trade in immigrants. As several authors note, a similar 1755 act was vetoed by Pennsylvania Governor Robert Hunter Morris because it was "an absolute prohibition on the importation of Germans."¹³³

Whether or not these acts decreased importation, they did little to alter the danger of the journey.¹³⁴ For example, in 1758, a newspaper editor outside of Pennsylvania estimated that 2000 passengers on 15 ships had died.¹³⁵ In 1765, the Pennsylvania Assembly amended the 1750 act because "experience" demonstrated that "some further provision and regulation" was necessary. The amended act specified the number of people who could be put in "one bedstead," noting that a father or mother could have their children with them if they so desired. A chest of medicines and an "able and well recommended surgeon" had to be on board and they had to be free if the ship carried more than fifty passengers. Twice a week the master of the vessel had to burn tar between the decks and wash the ship with vinegar. He could not sell "spirituous liquors" or food supplies at more than "fifty per centum profit." Upon arrival, a bilingual German inhabitant of Philadelphia had to be brought on the vessel to read the laws to and interpret for the passengers. Moreover, the shipmaster had to arrange with custom officials so that the passengers, ignorant of the custom laws, would not have their goods seized.¹³⁶ At least one Philadelphia merchant, Thomas Clifford, took these acts seriously. His instructions to his ships included washing them down with vinegar and leaving a "six feet long & 20 inches or two feet broad" space for adults.¹³⁷ Once again, however, the trade continued.

Throughout it all, importing indentured servants remained a trade, or, as one author has termed it, "a thoroughly commercialized institution."¹³⁸ In

"victuals for passengers at their setting forth from the Downes or other parts of England" and to ensure that "poor servants do not want cloathes and bedding." Act VIII (March 1657-1658), 1 THE STATUTES AT LARGE . . . OF VIRGINIA, *supra* note 45, at 435. Whether the act continued into force in the eighteenth century is not clear.

133. PROPER, *supra* note 93, at 52; HERRICK, *supra* note 30, at 163-64.

134. See Farley Grubb, *Morbidity and Mortality on the North Atlantic Passage: Eighteenth-Century German Immigration*, 17 J. INTERDISCIPLINARY HIST. 565, 566-85 (1987). Basing his evidence on surviving passenger manifests and bills of mortality for Philadelphia, Grubb argues that the voyage mortality for adults was about 4 percent and for children about 8 percent. For a contemporary discussion of the perils of the voyage, see GOTTLIEB MITTELBERGER, JOURNEY TO PENNSYLVANIA 9-32 (Oscar Handlin & John Clive ed., 1960).

135. See BILLY G. SMITH, THE "LOWER SORT": PHILADELPHIA'S LABORING PEOPLE, 1750-1800, at 43-45, n.7 (1990).

136. A Supplement to the act, ch. DXXVII (May 1765), 6 THE STATUTES AT LARGE OF PENNSYLVANIA, 1682-1801, *supra* note 87, at 432-40.

137. BAILYN, *supra* note 30, at 318.

138. STEINFELD, *supra* note 23, at 89.

1740, Pennsylvania Governor George Thomas wrote to the Privy Council concerning the "trade of servants." He believed that the trade produced great losses to England. Merchants deluded tradesmen with "promises of mighty advantages," persuaded them to come to Pennsylvania, and then sold "them for their own benefit, the tradesmen not receiving one shilling of wages during the whole time of a very hard servitude." The governor added that, when he had "resolved to be neutral in the affair of servants," the Assembly had "rewarded" him "with calumny" by cutting off half of his support.¹³⁹

Into the late eighteenth century, the perception remained that the transportation of indentured servants was a trade. In 1788, Phineas Bond, the British Consul, noted that the indentured servant trade had been revived after the Revolution. Bond argued that the "trade [was] very oppressive" and a drain on Ireland and Great Britain. He recognized that "very salutary laws to regulate this trade" had been passed by Pennsylvania but concluded that they were "too often evaded."¹⁴⁰ Because "the passenger trade" was "so profitable" and "lucrative to those who are engaged in it," Bond predicted it would be "carried on extensively."¹⁴¹

IV. INDENTURED SERVANTS AND THE WANING OF THE COMMERCE

The indentured servitude trade did not end with the American Revolution.¹⁴² However, between the Revolution and the start of federal immigration records in 1819, the cultural perception of immigrants began to change. After describing in the first section the end of indentured servitude as a central institution for immigration, the second section examines laws passed during these fifty years that regulated immigration: the Constitution, state convict regulation, and state protective measures. Changes in these areas suggest that the perception that immigrants were articles of commerce was becoming unstable.

139. Governor Thomas' objections to an act laying an excise . . . (October 20, 1740), 4 THE STATUTES AT LARGE OF PENNSYLVANIA, 1682-1801, *supra* note 87, at 474-75; see HERRICK, *supra* note 30, at 163-64.

140. Letters of Phineas Bond, British Consul at Philadelphia to the Foreign Office of Great Britain, 1787, 1788, 1789, in 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION, 1896 & 1897, at 513, 582 (J. Franklin Jameson ed., 1897-1898) (letter of November 16, 1788); *id.* at 642-43 (letter of November 10, 1789); *id.* at 613 (letter of August 15, 1789).

141. *Id.*

142. *Id.* at 582.

A. The End of a Commerce

Although the Revolution had partially defined itself by a disagreement over the migration to people to North America, the sporadic nature of immigration to the United States before 1815 meant that little thought needed to be given to the status of European immigrants.¹⁴³ Ironically, the war for independence curbed migration to America until after the Peace of 1783. Although immigration began again in 1784 and 1785, it ceased with the French Revolution and the European Wars. After the Treaty of Amiens in 1801, it started once more. Between 1801 and 1802, as many as 20,000 people may have entered the United States. In 1803, however, new hostilities closed most of Europe and President Thomas Jefferson's embargo in 1807 ended the remaining outlet for immigration from Ireland. In 1809, immigration started up but was limited by British impressment and the enforcement of a British passenger act limiting the number of people carried on vessels. From 1812 to 1815, war again brought immigration to a virtual halt. Overall, from 1790 to 1815, immigration was "hardly more than a trickle."¹⁴⁴

After 1815, immigration increased. To the contemporary observer, the summers and falls of 1816, 1817, and 1818 brought a torrent of people to the new nation.¹⁴⁵ Among these immigrants remained a number of indentured

143. The Declaration of Independence accused King George of endeavoring "to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration thither." DECLARATION OF INDEPENDENCE para. 9.

144. HANSEN, *supra* note 107, at 77; *see id.* at 53-54, 67-71, 77; JONES, *supra* note 107, at 64. Estimates on the numbers differ. Gemery states "that a minimum net migration estimate for 1780-1820 is on the order of 400,000; and the conclusion that the maximum level of migration could approach one million." Henry A. Gemery, *European Emigration to North America, 1700-1820: Numbers and Quasi-Numbers*, 1 PERSPECTIVES IN AMERICAN HISTORY, NEW SERIES 283, 316-17 (1984). Others have estimated 250,000 people between 1790 and 1815. *See* HANSEN, *supra* note 107, at 77; TREASURY DEPARTMENT REPORTS, BUREAU OF STATISTICS, ARRIVALS OF ALIEN PASSENGERS AND IMMIGRANTS IN THE UNITED STATES FROM 1820 TO 1888, at 7 (Washington 1889).

145. For accounts of the numbers of incoming emigrants, *see*, for example, NILES' WEEKLY REGISTER, Jan. 13, 1816, at 348; Aug. 3, 1816, at 371-72; Aug. 10, 1816, at 400; Aug. 17, 1816, at 401; Aug. 24, 1816, at 419; Aug. 31, 1816, at 15; Sept. 7, 1816, at 32; Sept. 21, 1816, at 61; Oct. 19, 1816, at 127; Aug. 30, 1817, at 16; Sept. 13, 1817, at 35; Sept. 27, 1817, at 79; Oct. 25, 1817, at 143; Nov. 1, 1817, at 157; Jan. 10, 1818, at 314; May 2, 1818, at 175; May 23, 1818, at 223; May 30, 1818, at 240; June 6, 1818, at 256; July 11, 1818, at 244; Aug. 1, 1818, at 380; Aug. 8, 1818, at 408, 424.

servants. With the increase in immigrants, came an increased appreciation of the perils of their voyage. For example, on January 31, 1818, *Niles' Weekly Register* reprinted an earlier report that five hundred of the eleven hundred passengers who had boarded the ship *April* in Amsterdam had died on route.¹⁴⁶ These concerns led to the spring 1819 passage of a federal act designed to improve transoceanic travel.

But by the winter of 1819, the institution of imported indentured servants had disappeared. The federal passenger act, sporadic moves towards abolishing imprisonment for debt, changes in the cost of passage, international restrictions, and new attitudes towards the institution have been cited as causes of its disappearance. The catalyst seems to have been the 1819 national economic collapse that prohibited importers from selling the passengers as indentured servants and bankrupted the agents of the business. As one author stated, "From this blow the redemptioner trade never recovered."¹⁴⁷ The crash, combined with growing national and international attention towards race-based slavery, may have made re-establishment of white indentured servitude impossible.¹⁴⁸

146. NILES' WEEKLY REGISTER, Jan. 31, 1818, at 378. For other accounts of passage deaths, see, for example, NILES' WEEKLY REGISTER, Nov. 1, 1817, at 157; July 11, 1818, at 344.

147. HANSEN, *supra* note 107, at 105. A few examples of imported indentured servants can be found after 1819. For example, in April 1827, the American consul in Rotterdam wrote to the governor of Georgia offering the service of certain people as redemptioners if their passage far was advanced. NILES' WEEKLY REGISTER, Sept. 1, 1827, at 5, in EDITH ABBOTT, HISTORICAL ASPECTS OF THE IMMIGRATION PROBLEM 61 (reprint ed. 1969) (1926).

The economic collapse thesis appears in HANSEN, *supra* note 107, at 102-4. Miller attributes the end to the 1819 Pennsylvania passenger act. Miller, *supra* note 31, at 134-36. Galenson suggests that the disappearance was linked to "a general decline in the quantitative importance of immigration in the late eighteenth and early nineteenth centuries." GALENSON, *supra* note 24, at 179. Salinger suggests that "bound labor lost its financial attractiveness." SALINGER, *supra* note 30, at 151. Herrick advances the abolition of debt and little demand for bound labor theses. HERRICK, *supra* note 30, at 266. The change of attitude hypothesis depends on documents such as the December 1819 Memorial to Congress from James Brown of Tennessee who ran into difficulties when he attempted to get a court to recognize his right to retain his runaway redemptioners. AMERICAN STATE PAPERS (1832-), "Class X: Miscellaneous," pt. II, at 550-59.

148. See STEINFELD, *supra* note 23, at 164-72.

B. Immigrants as "Imports" or "Migrants"

During this period of fluctuating immigration, the assumption that immigrants were articles of commerce began to change. Language in the Constitution and state laws demonstrated that many people no longer perceived immigrants as articles of commerce. By 1819, as indentured servitude collapsed, a new federal passenger act, in essence, codified the disappearance by acknowledging the existence of an immigration of "passengers."

1. The Constitution

When the war ended and immigration to a new nation became a possibility, delegates met at Philadelphia to write a Constitution. Ascertaining their perspective on the location of immigration power is difficult. From our modern perspective, no constitutional provision directly addressed immigration.

Two clauses may have been intended to be applicable. Like much of the Constitution, they appeared open, perhaps purposefully, to a variety of meanings. Article I, section 8 stated that "the Congress shall have the power . . . [t]o regulate commerce with foreign nations."¹⁴⁹ If people moving from one country to another constituted "commerce," then Congress seemed to have the power to regulate them. But nowhere did the Constitution state whether "commerce" included immigrants.

A similar lack of clarity surrounded article I, section 9:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.¹⁵⁰

On its face, section 9 appeared to apply to immigration. The language suggested that the states initially possessed some power to admit—and, therefore, to prohibit—the admission of people to their territory. Until 1808, Congress seemed limited to imposing a tax on the importation of people. In 1808, however, section 9 seemed to suggest that Congress would be able to prohibit any or all people from entering.

149. U.S. CONST. art. I, § 8, cl. 3. For a discussion of the absence of the Constitution's immigration authority, see ALENIKOFF & MARTIN, *supra* note 4, at 1-18.

150. U.S. CONST. art. I, § 9, cl. 1.

Nevertheless, although the word "migration" appears and the word "importation" historically had been applied to the admission of indentured servants and other passengers, to one group of delegates the importation or admission of white Europeans was not of primary concern. For them, the clause appears to have referred to a more immediate and controversial issue: the slave trade. Just as throughout the Constitution the word "slave" does not appear,¹⁵¹ so in article I, section 9, a proposal for inserting "the importation of slaves into North Carolina, South Carolina, and Georgia" was abandoned lest the clause "give offense."¹⁵² After the Convention ended, these delegates—all from colonies such as Virginia and North Carolina where the indentured servant trade had long since given way to the slave trade—could not fathom how some could perceive "importation" to refer to white immigrants. James Madison of Virginia noted, in *Federalist* 42, that some had sought "to pervert this clause into an objection against the Constitution by representing it . . . as calculated to prevent voluntary and beneficial emigrations from Europe to America." He rejected such "misconstructions."¹⁵³ In North Carolina, James Iredell attempted to clarify the difference between immigrants and slaves. The word "imported" was the key. He insisted that "migration" referred only to "free people" "who cannot be said to be imported" and therefore only "imported" slaves would be

151. U.S. CONST. art I, § 2 cl. 3 (three-fifths clause); art. I, § 9, cl. 1 (import and migration clause); art. I, § 9, cl. 4 (direct tax clause); art. IV, § 2, cl. 3 (fugitive slave clause); art. V (no amendment clause). For a discussion of slavery during the Convention, see, e.g., Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 188-225* (Richard Beeman et al. eds., 1987).

152. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1966); *id.* at 364-65 (Aug. 21); *id.* at 369-75, 378 (Aug. 22); *id.* at 396, 400 (Aug. 24); *id.* at 408-9, 415-17 (Aug. 25); see MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 149-51 (1913); Finkelman, *supra* note 151, at 211-18. The quote is from Gouverneur Morris, 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 415; see also JAMES MADISON, 3 THE PAPERS OF JAMES MADISON 1427-29 (1840) ("Mr. Madison thought it wrong to admit in the Constitution the idea that there could be property in men") (Aug. 25, 1787).

153. THE FEDERALIST No. 42, at 281 (James Madison) (Carl Van Doren ed., 1945).

taxed.¹⁵⁴ Congress might not have power over those—white immigrants—who were not "imported."

154. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 100-2 (Jonathan Elliot ed., 1836) [hereinafter DEBATES] (debate in the North Carolina Ratifying Convention, July 26, 1788). For those who interpreted the clause as referring only to the slave trade, its existence briefly raised the issue of the limitations of state or federal power over commerce. The existence of federal power over commerce, let alone immigration, was unclear. In the Virginia Convention, Governor Edmund Randolph argued that the "exception made respecting the importation of negroes" arose "[n]ot from a general power," but from the expressly enumerated power given to the general government "of regulating commerce." 3 THE DEBATES, *supra*, at 464. The sentiment was echoed by Madison: "As to the restriction in the clause under consideration, it was a restraint on the exercise of a power expressly delegated to Congress; namely, that of regulating commerce with foreign nations." *Id.* at 455. Others in Virginia perceived no express grant of power to Congress for the purposes of restricting entry and grew concerned that the clause demonstrated that Congress could obtain powers by implication. Patrick Henry argued that "the insertion of these restrictions on Congress was a plain demonstration that Congress could exercise power by implication." *Id.* at 455.

The Convention's establishment of a constitutional relation between federal commerce power and certain state regulations has been much debated. In the early twentieth century, Felix Frankfurter asserted that, in the federal convention and the Constitution, the "conception that the mere grant of the commerce power to Congress dislodged state power finds no expression." FRANKFURTER, *supra* note 12, at 13. Another author summarized his understanding of the federal convention's position: "It seems to have been common ground that the general government as constituted—or reconstituted— . . . was to possess a power of regulating commerce. It was by no means so universally agreed that there should be a clause granting it *the* power 'to regulate commerce.'" Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 432 (1941).

After the convention, Alexander Hamilton in *Federalist* 32 articulated a vision of federalism that might support the opposite conclusion. He argued that "the State governments would clearly retain all the right of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States." Exclusive delegation occurred, according to Hamilton, only (1) where the Constitution granted it in "express terms," (2) "where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority," or (3) "where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." THE FEDERALIST No. 32, at 200 (Alexander Hamilton) (Carl Van Doren ed., 1945).

With arguments about an exclusive or non-exclusive commerce power both available, the interpretation of the Constitution's Commerce Clause remained for the Supreme Court to decide "without substantial guidance or restriction by previous discussion and analysis." FRANKFURTER, *supra* note 12, at 14; *see* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 15 (1950).

But, to others, "importation" did not signify only slavery. Those from states such as Pennsylvania and Maryland, where the trade in indentured servants had continued into the late eighteenth century, thought that the clause could refer to white immigrants. Gouverneur Morris of Pennsylvania worried in the federal constitutional convention that the clause would permit Congress to "tax freemen imported."¹⁵⁵ In the Maryland convention, Luther Martin reported that, although the phrase had been intended to refer only to slaves, it would probably permit the taxing of all immigrants.¹⁵⁶ And in the Pennsylvania convention, Robert Whitehill replied to a speech by James Wilson by suggesting that unless one was "ignorant of the English language," the phrase's use of "importation" also referred to the "migration of Europeans."¹⁵⁷ To these delegates, Congress might have exclusive power over immigration.

The continuation of slavery and the end of indentured servitude had begun to alter the traditional perception that British and European immigrants were imported articles of commerce. Yet the change was gradual and regional. To some, "importation," and perhaps "commerce," referred to immigrants, indentured servants, and slaves. To others, "imported" could refer only to slaves—or, at the most, involuntary imported convicts. The words were not a compromise. Both sides thought that they knew what the words meant. They just believed the words meant different things. This disjunction meant that the Constitution contained the seeds for conflicting theories about federal immigration power.

2. The End of the Convict Trade

The efforts to end the convict trade betrayed the same uncertainty about the word "importation." After the Revolution, the British had attempted to return to transporting convicts to North America. By June 1785, however, a Parliamentary Committee concluded that "the Ports of the United States have been shut against the Importation of Convicts."¹⁵⁸ The new nation wanted to ensure that convict importation would stay ceased. In the interim period between the final ratification of the Constitution and the start of the new

155. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 152, at 417 (Aug. 25). George Mason of Virginia assured him that the tax was not aimed at voluntary migration but had been necessary to prevent the introduction of convicts. *Id.*

156. 1 THE DEBATES, *supra* note 154, at 372-73.

157. 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 831 (Dec. 3, 1787) (Bernard Bailyn ed., 1993).

158. *Report of Parliamentary Committee on Convicts, June 1785, Home Office 42/6, quoted in* EKIRCH, *supra* note 44, at 236.

government, the Continental Congress passed a resolution on the convict trade.¹⁵⁹

In the Continental Congress, a resolution was proposed that the states "pass laws prohibiting the *importation* of convicts from territories of foreign nations." Without comment, the final resolution replaced the words, "*importation* of convicts." The final resolution, passed on September 16, 1788, recommended "to the several states to pass proper laws for preventing the *transportation* of convicted malefactors from foreign countries into the United States."¹⁶⁰ The choice not to use the word "importation" in reference to convicts was not necessarily followed in the states. For example, Pennsylvania's statute sought to "prevent the importation of convicts" by authorizing a three-month prison sentence and a fifty-pound per person fine on any importer.¹⁶¹ For others, however, convicts were no longer to be "imported."

3. State Protective Regulation

"Imported" immigrants also disappeared from state legislation. As states permanently barred the convict trade and, with the exception of South Carolina and Georgia, moved to bar the slave trade, state legislation over the indentured servant trade no longer seemed to be regulating a form of commerce. The willingness to encourage the trade decreased as most legislation increasingly sought to protect the immigrant. For example, as early as 1799, although New York continued to recognize indentures for people "coming from beyond the sea," minors could not be bound past twenty-one to pay passage. No longer were shipmasters guaranteed the passage fare and a return on their investment.¹⁶²

159. June 21, 1788, the ninth state, New Hampshire, ratified the Constitution. On September 13, the Continental Congress set March 4 for the commencement of the new government's operation. 1 DEBATES, *supra* note 154, 1097-98, 1099.

160. 34 THE JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 528-29 (W.C. Ford ed., 1904-1937). The apparent earlier version appears in note 3 without any commentary. All italics are the author's.

161. An ACT to prevent the importation of convicts into this commonwealth, ch. CCCCLXIII (March 1789), STATUTES AT LARGE OF PENNSYLVANIA 692-93. For a general account, see EKIRCH, *supra* note 44, at 230-38. Authors differ over which states followed the Resolution. A nineteenth-century author lists Virginia, South Carolina, Georgia, New York, New Jersey, Massachusetts, and Pennsylvania. JOHN P. SANDERSON, REPUBLICAN LANDMARKS: THE VIEWS AND OPINIONS OF AMERICAN STATESMEN ON FOREIGN IMMIGRATION 49 (1856). Miller lists South Carolina, Connecticut, Virginia, Pennsylvania, and Rhode Island. Miller, *supra* note 31, at 137 n.19, 140.

162. AN ACT to amend . . . , ch. 80 (April 1799), 4 LAWS OF THE STATE OF

Twenty years later—almost a decade after the transatlantic slave trade had ended, almost three decades after the convict trade had ceased—the only legally "imported" persons were British and Europeans. Despite this reality of a continuing trade in imported white immigrants, the statutes abandoned references to indentured servants as "imported." Under pressure from immigrant associations, Maryland passed a passenger act in 1817. The preamble stated,

WHEREAS, it has been found that German and Swiss emigrants, who for the discharge of the debt contracted for their passage to this country, are often obliged to subject themselves to temporary servitude, are frequently exposed to cruel and oppressive impositions by the masters of the vessels in which they arrive, and likewise by those to whom they become servants.

Expressing concern over the passenger as an "emigrant" in "debt" who might have to become an indentured servant, the act contained a list of protective measures requiring bilingual registers, mandatory schooling of minors, and limitations on passage payment.¹⁶³

NEW YORK . . . EIGHTH, NINTH, TENTH AND ELEVENTH SESSIONS 329-31 (1886). The 1801 act allowed minors to be bound only to twenty-four, "*provided* the term of such service shall not exceed four years in the whole." AN ACT concerning apprentices and servants, ch. 11 (February 1801), 5 LAWS OF THE STATE OF NEW YORK TWENTY-FOURTH SESSION 14, 17 (1887). The 1799 act's provisions for reporting continued 1801. AN ACT for the settlement and relief of the poor, ch. 184 (April 1801), *id.* at 521-23.

Other post-Revolution New York acts adopted a similar theory. New York's 1788 law for the settlement of the poor explicitly referred to "foreigners" who had to be reported to the recorder. AN ACT concerning apprentices and servants, ch. 15 (February 1788); AN ACT for the better settlement and relief of the poor, ch. 62 (May 1788), 2 LAWS OF THE STATE OF NEW YORK EIGHTH, NINTH, TENTH AND ELEVENTH SESSIONS 620, 622-23, 731, 742-43 (1886). In 1797, New York amended the act to require the shipmaster to report the "name and occupation" of every person brought into the port. A shipmaster who did not report became liable to a fine of fifty dollars per United States citizen and seventy-five dollars per foreigner. AN ACT to amend . . . , ch. 101 (April 1797) 4 LAWS OF THE STATE OF NEW YORK TWENTIETH, TWENTY-FIRST, TWENTY-SECOND AND TWENTY-THIRD SESSIONS 134-35 (1887).

163. An act relative to German and Swiss Redemptioners, ch. 226 (February 1818), LAWS OF MARYLAND [DECEMBER SESSION 1817] 224-26. The act required the appointment of a bilingual register of indentures, the inclusion in the indentures of minors of mandatory two months of schooling per year, and a limitation of four years of service by adult immigrants. An immigrant could not be detained more than thirty days on board a vessel. During this time the master had to provide provisions without any cost to the immigrant. If a passenger had died after "the expiration of one half of the duration of the voyage," his or her property could be sold to pay for the fare,

One year later, in 1818, Pennsylvania statutes demonstrated the growing distinction between the immigrants and "articles of commerce." The legislation continued the substantive provisions of the state's pre-revolutionary passenger laws. The provisions, however, now were divided into two separate acts. One act contained elements relating to the ship and to transatlantic commerce—food provisions, passage fares, and ship cleanliness.¹⁶⁴ Another act contained elements relating to the immigrant—regulations relating to the passenger's discharge from the vessel, the liability for passage, the procedures for indenture, and the reporting of passengers to the register. Curiously, however, revealing that the perceptions remained unsettled, the legislature placed the elements involving the ships under a title that suggested the regulatory power lay in a traditional power of the state over health and welfare while the sections regarding passengers remained in an act addressing "importation."¹⁶⁵

C. The Beginning of Immigration: The Federal Passenger Act

Demonstrating a similar concern for immigrants and a similar ambiguity over the perception of immigrants, Congress began work in 1818 on a bill regulating passenger ships. The federal government's belief that immigrants were commerce had been expressed four years earlier by John Quincy Adams in an argument to the British that passengers were to be classified as commerce.¹⁶⁶ The traditional understanding that immigrants were "articles

but the remaining proceeds went to the family. If no one claimed the money, after three years, the German Society of Maryland collected it.

164. AN ACT For establishing a Health Office, and to secure the City and Port of Philadelphia from the introduction of pestilential and contagious diseases, and for other purposes, ch. XXX (January 1818), ACTS OF THE GENERAL ASSEMBLY . . . OF PENNSYLVANIA . . . [1817 SESSION] 38-62 (1818). Regulations limited the number of people per vessel to one person for "every two tons custom house measurement," required the ship to carry adequate provisions and a physician, mandated that the ship be washed with vinegar, and barred the shipmaster from permitting passengers credit for liquor over four dollars during passage. *Id.* at 54.

165. AN ACT For regulating the importation of German and other passengers, ch. XXXV (February 1818), *id.* at 66-72. Aware that the two laws "would be in a great degree defeated unless regulations of the same, or of a similar import shall be adopted by the state of Delaware," the Assembly passed a resolution requesting the governor to transmit the copies of both laws to the Governor of Delaware, "with a request that he would lay the same before the legislature and invite their adoption of similar regulations." Resolution, ch. III (February 1818), *id.* at 310-11.

166. See HANSEN, *supra* note 107, at 83. Adams wanted to prove that the 1815 commercial treaty barred enforcement of the British passenger act limiting the number of passengers carried by American ships leaving Ireland. In 1816, the British "granted

of commerce" appeared in the fact that the Committee on Commerce and Manufacturing introduced the bill. Most of the provisions of the bill were not unusual but imitated British, Pennsylvania, and Maryland legislation. The only unusual aspect was the federal nature of the legislation. No debate, however, appears to have occurred over the power of the government to pass the bill or the substance of the bill. Noting only "the crowded state" of the vessels and the "many lives" that had been lost, Congress passed the final version of the act on May 2, 1819.¹⁶⁷

American vessels in English and Irish ports the same quota as the British." HANSEN, *supra* note 107, at 83.

167. An Act regulating passenger ships and vessels, ch. XLVI (March 1819), 3 Stat. 488-89 (1819). For the legislative history of the bill, see 31 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES . . . 1222 (15th Congress, 1st Session) (Dec. 1, 1817-Apr. 20, 1818) (1854); 33 THE DEBATES AND PROCEEDINGS IN THE CONGRESS . . . , *supra*, at 80, 112-113, 205, 206, 1037 (15th Congress, 2d Session) (Nov. 16, 1818-Mar. 3, 1819) (1855); 34 THE DEBATES AND PROCEEDINGS IN THE CONGRESS . . . , *supra*, at 1393, 2496-98 (15th Congress, 2d Session) (Nov. 16, 1818-Mar. 3, 1819) (1855).

Problems under the act involved how to estimate the tonnage, by what country's measure, and whether deductions should be made for children or crew. *See* United States v. The Louisa Barbara, 26 Fed. Cas. 1000 (E.D. Pa. 1833) (No. 15,632). The act limited the passengers to two persons per five tons "according to custom-house measurement." It also required passenger ships leaving for Europe to carry sufficient provisions. Although the act may have been more effective than state acts, the federal act contained ambiguities that rendered it "merely a regulatory, not a restrictive," measure. HANSEN, *supra* note 107, at 102; *see* E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965, at 20-22 (1981).

For contemporary references to the bill, see NILES' WEEKLY REGISTER, Dec. 19, 1818, at 292; Jan. 15, 1820, at 322; WILLIAM RAWLE, AN ADDRESS DELIVERED BEFORE THE PHILADELPHIA SOCIETY FOR PROMOTING AGRICULTURE, JANUARY 19, 1819, at 22 (1819). A guide for immigrants published in the early 1830s printed the passenger act and then added: "When paupers are sent by the parish, it is imperative that each family should have at least five pounds, and be able to produce it before they will be allowed by the American Government to set a foot in the United States: should this not be attended to, they will not be allowed to land." S.H. COLLINS, THE EMIGRANT'S GUIDE . . . 67-70 (Hull, England, 4th ed. n.d.). The bill had no such requirement.

Congress had previously passed one other law affecting passengers. A 1799 act stated that "the wearing apparel, and other personal baggage, and the tools or implements of a mechanical trade only, of persons who arrive in the United States, shall be free and exempted from duty." An Act to regulate the collection of duties on imports and tonnage, ch. 110 (March 1799), 1 Stat. 645-47 (1799). A discussion of the statute's relevance for immigrants appears in CALVIN COLTON, MANUAL FOR EMIGRANTS TO AMERICA 180-81 (1832).

Yet, even as the act reaffirmed the old assumption that people entering were "articles of commerce," the act also revealed the newer perception that those entering were "passengers." With economic collapse, 1819 had brought the end of indentured servitude. With the new act, 1819 brought the beginning of a new institution: "immigration." Included apparently by amendment, the last section of the act required the ship captain to report "the age, sex, and occupation, of the said passengers, respectively, the country to which they severally belong, and that of which it is their intention to become inhabitants." The custom officials were required to deliver copies of these reports to the Secretary of State who, in turn, would report to Congress. These reports began what would become the official records of immigration to the United States.¹⁶⁸

The beginning of immigration records and the end of indentured servitude did not simplify the legal regulation of immigration. The remnants of two centuries of colonial experience in regulating bound labor remained. The Constitution's Commerce Clause, the federal passenger act, and the duty-bond-list structure of state acts regulating entry gave witness to an assumption that immigrants were "articles of commerce." But the linguistic transformation from "imports" to "passengers" or "migrants" that immigrants had undergone in these same acts appeared to argue in favor of an opposite assumption that immigrants were not "articles of commerce." In 1819, both assumptions could coexist.

V. IMMIGRANTS AS "ARTICLES OF COMMERCE"?—THE STRUGGLE

Both assumptions, however, could not long continue to exist. In 1820, New York reaffirmed, "notwithstanding the repeal, modification, or alteration of the laws of the United States," that masters of vessels had to report their passengers to the custom house.¹⁶⁹ State laws like this one, the continuation of old efforts to regulate the indentured servant trade, would become the major weapons of state efforts to exclude immigrants during the nineteenth

168. An Act regulating passenger ships and vessels, ch. XLVI (March 1819), 3 Stat. 488-489 (1819). Hutchinson states that the "uninterrupted series of immigration data for the United States does in fact start with the 1819 Act." HUTCHINSON, *supra* note 167, at 22. Nineteenth-century immigration authors also stated that the period of immigration began in 1820 with the collection of statistics. See WILLIAM J. BROMWELL, HISTORY OF IMMIGRATION TO THE UNITED STATES 13-15 (1856); RICHMOND MAYO-SMITH, EMIGRATION AND IMMIGRATION: A STUDY IN SOCIAL SCIENCE 37 (1890).

169. AN ACT to amend . . . , ch. CCXXII (April 1820), LAWS OF THE STATE OF NEW YORK . . . FORTY-THIRD SESSION 203 (1820); CHARLES WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY, 1789-1835, at 608 (1937).

century.¹⁷⁰ Over fifty years would pass before the Supreme Court resolved the constitutionality of such laws. The passage of time made the issue increasingly difficult. Four cases gradually clarified that state immigration restrictions could not be decided until the Court decided explicitly whether people were "articles of commerce." Perceptions arising from the continued existence of slavery would cause justice after justice to hesitate and eventually angrily to disagree.

A. Gibbons: Almost an Assumption

In 1824, the Supreme Court heard the first case to raise the issue of people as "articles of commerce." *Gibbons v. Ogden* involved a steamboat monopoly originally granted to Robert R. Livingston and Robert Fulton by New York, operated under license by New Jersey Governor Aaron Ogden. After a number of quarrels with Ogden, Thomas Gibbons began a rival steamboat company. On October 18, 1818, Ogden filed for an injunction against Gibbons. The litigation that followed reached the Court for decision in 1824. Represented by Daniel Webster and the United States Attorney General William Wirt, Gibbons prevailed. Although the sophisticated arguments of counsel and lengthy opinion by Justice Marshall fill 240 pages of the *United States Reports*, Marshall decided the case ultimately by concluding that the federal Coasting Act of 1793 which licensed Gibbons was supreme over and displaced conflicting state statutes.¹⁷¹

Court observers, however, believed that the Court decided grander questions of the federal relationship. William Gibbons wrote to his father, Thomas, on February 23, 1824:

in the course of the conversation with Webster today, he told me *confidentially* that one of the Judges had said, that up to the time of his opening the cause a majority of the Court were under the impression that it was merely a question of collision between a right derived under the New York Laws and a right derived from the U. States—that they were to decide—but after hearing the argument they have changed that opinion & consider it more than collision[,] that it is a broad constitutional question upon which scarcely any doubt exists.¹⁷²

170. For a summary of state laws, see HUTCHINSON, *supra* note 167, at 396-404.

171. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); MAURICE BAXTER, *THE STEAMBOAT MONOPOLY: GIBBONS V. OGDEN* 3-36 (1966). James Kent, overruled by *Gibbons*, asserted the limited nature of the Court's decision in *Gibbons*. James Kent, 1 COMMENTARIES IN AMERICAN LAW 432-39 (reprint ed. 1884) (13th ed. 1826); BAXTER, *supra*, at 71.

172. DANIEL WEBSTER, 3:1 PAPERS OF DANIEL WEBSTER: LEGAL PAPERS 289 (1989) (William Gibbons to Thomas Gibbons, February 23, 1824). Gibbons felt that

Marshall's lengthy exposition, however, created, rather than resolved, doubts on broad constitutional questions.¹⁷³

"like all the lawyers," Webster was "unreasonable in relation to Money Matters." He added, "It would not be a matter of surprise to me if he had the opinion of the Judges in his possession & meant to delay it until the matter of fees was settled." *Id.* Prior to the decision, Webster had guessed that the case would revolve around the "collision" between federal and state law. Soon after argument, however, he knew that the opinion might reach beyond the supremacy issue. *Id.* at 288 n.87 (Daniel Webster to Jeremiah Mason, February 15, 1824).

Earlier decisions suggested that the case would be decided as to whether concurrent state authority over commerce existed. Indeed, in an earlier decision about the steamboat before the New York state courts, Chancellor James Kent had decided that the existence of laws relating to importation proved the presence of concurrent state commerce authority. Kent wrote that the states

exercise, to a considerable degree, a concurrent power with congress in the regulation of external commerce. What are . . . [these] but regulations of external commerce? Our health and quarantine law, and the laws prohibiting the importation of slaves, are striking examples of the same kind. So the act relative to the poor, which requires all masters of vessels coming from abroad to report and give security to the mayor of New York, that the passengers, being aliens, shall not become chargeable as paupers, and in case of default, making even the ship or vessel from which the alien shall be landed liable to seizure, is another and very important regulation affecting foreign commerce.

Livingston & Fulton v. Van Ingen, 9 Johns. 507, 580 (N.Y. 1812).

173. Marshall toyed with, but did not adopt, the idea that the federal government had exclusive power over commerce. See BAXTER, *supra* note 171, at 48-52; FRANKFURTER, *supra* note 12, at 17-25. Some early commentators claimed that *Gibbons* did hold the exclusiveness of federal commerce power. For example, in 1898, one treatise stated, "In the opinion of the court, the supremacy of Federal authority, and the exclusive character of the national control of commerce, were clearly defined." E. PARMALEE PRENTICE & JOHN G. EGAN, *THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION* 16 (1898).

Similarly, Marshall neither approved nor rejected the idea that some concurrent state authority over commerce might exist. Marshall did not adopt the idea of concurrent state commerce power suggested by Kent. He hinted, instead, that a state might govern some areas relating to commerce under its power to "regulate its police." *Gibbons*, 22 U.S. at 208-10. The theory of "regulations of police" had been advanced by Webster as a justification for state laws on quarantines, ferries, and bridges. It bore some resemblance to Blackstone's category of "offenses against the public health, and the public police or economy." WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 161-75 (Sharswood ed., 1882) (1765-1769). Blackstone and others had seen the police power as one government's power over internal matters. Blackstone had suggested an idea of "police" which involved:

Most of the commentary on *Gibbons* surrounds the broader constitutional statements made in the case.¹⁷⁴ Yet lurking amid these statements was a series of sentences about whether people were "articles of commerce." The question arose unsurprisingly in *Gibbons* because steamboats carried passengers for hire. For both the lawyers, Marshall and Johnson, the idea that "commerce" included people was almost an assumption. *Gibbons*, however, demonstrated that the assumption was becoming open to question.

The lawyers for Ogden hesitatingly raised the issue near the end of their arguments. Thomas Oakley suggested that the "transportation of persons, or

the due regulation and domestic order of the kingdom, whereby the individuals of the state, like the members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious and inoffensive in their respective station.

Id. at 162. However, the right of a single sovereign to worry about wandering gypsies and lotteries did not necessarily lead to the right of a state to regulate the entry of immigrants. As argued by Webster and noted by Marshall, the police power seemed a route to the empowerment of two sovereign authorities. *See generally* FRANKFURTER, *supra* note 12, at 24-27.

The origins of the police power are unclear. According to Paul Freund, not until 1829, did any state begin to use "police" as a division within its statutes. *See* ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS*, at 2 n.2 (reprint ed. 1981) (1904) (the term first appeared in New York's Revised Statutes). For extremely brief and speculative discussions of the origins of police power before *Gibbons*, *see* W.P. PRENTICE, *POLICE POWERS ARISING UNDER THE LAW OF OVERRULING NECESSITY* 4, 8 (1894); W.G. Hastings, *The Development of Law as Illustrated by the Decisions Relating to the Police Power of the States*, 39 PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY 359, 361-67 (1900); FREUND, *supra* at 2; CHRISTOPHER G. TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES* 2 (1886). For a discussion of the origins of the "police power" as a theory of a regulated society, as opposed to a repository of state powers in opposition to federal commerce power, *see* William J. Novak, *Intellectual Origins of the State Police Power: The Common-Law Vision of a Well-Regulated Society* (University of Wisconsin Legal History Working Paper No. 3-2, 1989). For a discussion of the political implications of "police," *see* TOMLINS, *supra* note 23, at 35-97.

174. *See, e.g.*, WHITE, *supra* note 13, at 568-84 (discussing *Gibbons* as a case of "federal supremacy"); PAUL R. BENSON, JR., *THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970*, at 9-25 (1970); BERNARD C. GAVIT, *THE COMMERCE CLAUSE OF THE CONSTITUTION* 7-16 (reprint ed. 1970) (1932); David P. Currie, *The Constitution in the Supreme Court: States and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887, 938-53 (1982) (Currie acknowledges in a footnote the issue of whether passengers were commerce).

passengers for hire" was a "distinct business" from "commerce."¹⁷⁵ Yet Oakley gave no reasons for the distinction except that it was "notorious." Thomas Emmet repeated the distinction between vessels engaged in trade or commerce and those carrying passengers for hire.¹⁷⁶ He even concluded that the passenger act of 1819 was unconstitutional because Congress could not "regulate the conveyance of mere passengers."¹⁷⁷ Nevertheless, these statements never seemed to coalesce into an argument. Although Emmet accepted that "the *importation* of slaves is, and has always been, considered as a branch of commerce,"¹⁷⁸ he was only able to assert that "mere passengers" could not be regulated. He made no concerted attempt to explain why passengers were not commerce. Indeed, so fleeting seemed the argument that William Wirt's only response was to state:

That the regulation of commerce and navigation, includes the authority of regulating passenger vessels as well as others, would appear from the most approved definitions of the term commerce. It always implies intercommunication and intercourse.¹⁷⁹

The perception that people were "articles of commerce" remained relatively unscathed by the oral arguments.

Marshall's opinion seemed not to question the assumption that commerce included people. His great definition of commerce followed Wirt's approach both in its words and in its assertion of conventional wisdom:

Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations. . . . All America understands, and has uniformly understood, the word "commerce," to comprehend navigation.¹⁸⁰

"All America" and "uniformly understood" left little room for an argument that "commerce" did not include people. The assumption that "commerce" included people also underlay Marshall's discussion of article I, section 9. After explaining that the section confirmed congressional commerce power,

175. *Gibbons*, 22 U.S. at 76.

176. *Id.* at 89-90, 95-96.

177. *Id.* at 96. As a footnote to this statement, Emmet cited state legislation that required reporting of passengers "imported or landed." *Id.* at 97 n.a.

178. *Id.* at 103 (emphasis added).

179. *Id.* at 182-83.

180. *Id.* at 189-90. Charles Warren discovered perhaps the most interesting commentary on the choice of the word "intercourse" by Henry Seawall: "I shall soon expect to learn that our fornication laws are unconstitutional." WARREN, *supra* note 169, at 66.

Marshall noted that "this section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men, who pass from place to place voluntarily, and to those who pass involuntarily."¹⁸¹

Justice Johnson's concurrence echoed the assumption that people were "articles of commerce." Indeed, his definition of commerce even more explicitly accepted people as commodities: "Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care . . . become commodities, and enter into commerce. . . ." Johnson believed the "understanding of the framers" as shown in article I, section 9 "considers the right of controlling personal ingress or migration, as implied in the powers previously vested in congress over commerce." Johnson added, "although the leading object of this section undoubtedly was the importation of slaves, yet the words are obviously calculated to comprise persons of all descriptions." He concluded, "it is almost laboring to prove a self-evident proposition, since the sense of mankind, the practice of the world, the contemporaneous assumption, [the] continued exercise of the power, and universal acquiescence, have so clearly established the right of congress over . . . transportation of both men and their goods. . . ."¹⁸²

Yet despite these general assertions by both men that "commerce" included persons, Marshall explicitly refrained from making his assumptions about people as "objects of commerce" a part of the final decision. He noted, "If a real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed, that there is no fact in this case which can bring up that question." He noted that steamboats' "principal employment is the transportation of merchandise." Read carefully, Marshall's opinion not only avoided deciding the issue, it actually appeared to invite debate. Indeed, seen in this light, Johnson's concurrence may have been motivated as much by his disagreement over Marshall's refusal to declare persons "articles of commerce" as it was by Marshall's reluctance to find federal commerce power exclusive.¹⁸³

181. *Gibbons*, 22 U.S. at 207, 216-17.

182. *Id.* at 229-31 (Johnson, J., concurring).

183. Marshall and Johnson were both southerners. Both men "deplored the continued practice of the slave trade." WHITE, *supra* note 13, at 688; *see* Eskridge & Ferejohn, *supra* note 7, at 1372. Marshall did not own slaves; Johnson did. In 1822, however, Johnson had written an anonymous article opposing procedures used to try slaves—including Denmark Vesey—accused of planning a rebellion. And in 1823, Johnson had written an opinion invalidating South Carolina's attempt to keep free black seamen from leaving their ships. The opinion assumed that the seamen of any nation were part of foreign commerce. *Elikson v. Deliesseline*, 8 Fed. Cas. 493, 495 (C.C.D. S.C. 1823) (No. 4,366); *see* Scott Wallace Stucky, *Elikson v. Deliesseline: Race and the Constitution in South Carolina, 1823*, 14 N.C. CEN. L. J. 361, 361-405

Why did Marshall technically avoid reaching a decision that would declare that passengers were "objects of commerce"? Perhaps he was simply responding to every argument put forward by counsel. Perhaps he was simply demonstrating his legal ability to see each step in an argument. But perhaps Emmet's argument of a distinction between white passengers and black slaves as the "objects of commerce" within the general political culture surrounding the Missouri Compromise of 1820-1821 and the Court's recent struggle over the slave trade cases gave Marshall pause. *Gibbons* thus left a narrow opening for a future argument that passengers were not articles of commerce.¹⁸⁴

Just as Marshall never resolved the problem of national and state commerce power, so too did he never return to resolve whether all persons were the "objects of commerce." The two commerce cases that followed *Gibbons* provided no answer. *Brown v. Maryland* involved Maryland's license tax on importers of foreign goods.¹⁸⁵ *Willson v. The Black-Bird Creek Marsh Company* involved a dam permitted by Delaware over a "small navigable creek[] into which the tide flows." With respect to the commerce power problem, one author has noted that Marshall left "the issue of concurrent state authority over commerce in such doubt that both proponents of exclusive national power and defenders of concurrent power could cite *Gibbons* to support their views."¹⁸⁶ Future cases would soon prove that Marshall had left the issue over people as "articles of commerce" in a similar position. Marshall's refusal explicitly to hold what both he and Johnson suggested was a common cultural perception opened the door to future cases that might conclude that certain persons were not "articles of commerce."

(1984); DONALD G. MORGAN, JUSTICE WILLIAM JOHNSON, THE FIRST DISSENTER: THE CAREER AND CONSTITUTIONAL PHILOSOPHY OF A JEFFERSONIAN JUDGE 193-206 (1954); WHITE, *supra* note 13, at 341, 689; *see also* Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2098-99 (1993).

184. For a discussion of the slave trade cases, *see* WHITE, *supra* note 13, at 687-703; SWISHER, *supra* note 7, at 378-81. Currie notes that "Marshall had already said on circuit that the commerce power authorized Congress to outlaw the importation of persons." Currie, *The Constitution in the Supreme Court*, *supra* note 7, at 938 n.369. For a discussion of the complexity of slavery thought, *see* William W. Fisher, *Ideology and Imagery in the Law of Slavery*, 68 CHI.-KENT L. REV. 1051 (1993).

185. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 419-20 (1827). Marshall struck down the state statute as unconstitutional, not because it infringed upon an exclusive federal commerce power, but because, once again, it conflicted with a federal statute.

186. *Willson v. The Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829). Marshall upheld the state statute because it did not conflict with any federal law and seemed motivated by acceptable state objectives.

B. Miln: Hesitant Disagreement

The 1830s brought little chance that the door would be closed. As Carl Swisher notes, cases about the Commerce Clause raised the problems of "nationalism versus localism" and "the South's 'peculiar institution'"—"Immigration . . . raised problems of its own, quite apart from the fact that lawmaking for transportation or exclusion of white alien passengers had implications for the transportation of free Negroes and Slaves."¹⁸⁷ This background, combined with major changes of the Court's personnel, highlighted the issue of whether immigrants were "objects of commerce."

But the 1830s did not resolve the question; indeed, they merely began to demonstrate a hesitant disagreement within the Court. This vague disagreement would be largely responsible for the Court's inability to reach a decision in 1837 in *Mayor of the City of New York v. Miln*. *Miln* involved a New York law that required the master of any ship arriving in the port of New York to report passenger information and to post bonds for passengers who might become poor and chargeable to the city.¹⁸⁸ The case arose out of an action for debt incurred by George Miln, cosignee of the ship, the *Emily*. The declaration alleged that William Thompson, master of the *Emily*, had arrived in New York in August 1829 with one hundred foreign passengers and failed to make a report. The Court only construed the first provision requiring a report and did not address whether sureties or bonds could be required.¹⁸⁹ The gradual transformation of indentured servitude legislation into state immigration regulation and the increasing tensions over slavery left the Court puzzled over whether the focus of the New York legislation was foreign poor persons or the objects of a great transatlantic trade in immigrants.

187. SWISHER, *supra* note 7, at 396.

188. *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837). Information had to be reported to the mayor or recorder within twenty-four hours. Information included the name, place of birth, last legal settlement, age, and occupation of all passengers either landed at the port or landed elsewhere with the intention of proceeding to New York. The statute authorized a penalty of seventy-five dollars for each passenger falsely or not reported. Additional provisions required the shipmaster to post sureties of a sum not to exceed three hundred dollars for every passenger landed, to indemnify the city for expenses of any passenger who might become poor and chargeable to the city within two years. If the shipmaster wrongly failed to give a bond for anyone not a United States citizen, a penalty of five hundred dollars per passenger could be imposed. *Id.* at 130-31.

189. *Miln*, 36 U.S. at 104-5, 130-31. In one place, the case suggested that the debt amounted to \$15,000; however, Justice Barbour's opinion placed it at \$7,500, the correct amount if Thompson failed to report 100 passengers at a fine of seventy-five dollars each.

When *Miln* first reached the Court in 1834, the Court refused to decide the case. Whatever their disagreements in *Gibbons*, Marshall and Johnson, joined by Story and Duvall, appear to have thought that the state statute was unconstitutional. Justice Johnson, however, could not participate because of illness.¹⁹⁰ With only three justices available on his side, Marshall held the case over. As he noted, the "practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion."¹⁹¹

While *Miln* awaited reargument, a series of deaths and retirements resulted in the disappearance of the Marshall Court—and the end of the possibility that the New York law would be found unconstitutional. Justices Johnson and Marshall died and Justice Duvall resigned. By 1837, the newly constituted Court included a new Chief Justice, Robert Brooke Taney of Maryland, and James W. Wayne of Georgia and Philip Pendleton Barbour of Virginia. Marshall's biographer, Albert Beveridge, noted that "only one disciple of Marshall remained, Joseph Story."¹⁹² *The North American Review*, a contemporary legal periodical, assured its readers that Marshall's death had not meant that "night had fallen." Nonetheless, when it reviewed *Miln* and other cases of the 1837 January Term, it concluded that "circumstances had begun to cast their coming shadows."¹⁹³

The Court's personnel was not the only change that could affect *Miln*'s outcome. By 1837, the Atlantic states had become increasingly concerned over the apparent influx of poor immigrants. On April 18, 1836, Massachusetts brought a resolution to the Congress requesting the passage of a law to "prevent the introduction of foreign paupers in to this country." On May 2, the Senate resolved to inquire into the apparent increase in pauperism. As one Senator declared, citing a parliamentary investigation,

some parishes on their own accord, and without any authority in law, as it seems, adopted the plan of ridding themselves of the evil by persuading the paupers to immigrate to this side of the Atlantic. And whom, Mr.

190. 4 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 583 (1916-1919).

191. *Mayor of New York v. Miln*, 33 U.S. (8 Pet.) 118, 122 (1834); see BEVERIDGE, *supra* note 190, at 583. Justices Smith Thompson, John McLean, and Henry Baldwin thought the New York law was constitutional.

192. BEVERIDGE, *supra* note 190, at 584-87.

193. 46 *THE NORTH AMERICAN REVIEW* 126, 127 (1838) (reviewing Richard Peters' *REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES, JANUARY TERM, 1837*). Frankfurter cautioned against viewing the Court as "dramatic conflict between Darkness and Light: Marshall, the architect of a nation; Taney, the bigoted provincial and protector of slavery." He noted that was an error that "even the most sober historians" have made. FRANKFURTER, *supra* note 12, at 48. Frankfurter's opinion on this article would have been most interesting.

President, did they send? The most idle and vicious; furnishing them with money, besides paying their passage, and then leaving them on this continent.

By December 1836, the Treasury Department had filed a report with the Senate collecting facts about "the deportation of paupers from Great Britain and other places."¹⁹⁴

In February 1837, the new Court heard oral argument in *Miln*. The arguments made by counsel on both sides revealed the continued perception that immigrants were "articles of commerce." New York City's attorneys never argued that poor immigrants could not be "articles of commerce." On one hand, they assumed passengers were commerce but argued for concurrent state commerce authority.¹⁹⁵ On the other hand, they tried to distinguish passengers in transit from passengers landed. Accepting that passengers were commerce when in transit, New York's attorneys claimed that passengers once landed became subject to state police powers.¹⁹⁶ The rationale behind the lawyers' argument stemmed less from the logic of federalism than from history. They pointed out that the New York law had existed for "nearly thirty years, without, until now, a claim to object to its provisions or its purposes."¹⁹⁷ To them, the existence of article I, section 9, the 1788 convict resolution, and state laws relating to quarantine, passenger regulation, pilotage, wrecks, "colored passengers and seamen," and harbors suggested that the New York law had to be constitutional.¹⁹⁸

194. S. DOC. NO. 24-342 (1836), H.R. DOC. NO. 24-219 (1836); 12 REGISTER OF DEBATES IN CONGRESS (1836), at pt. 2, 1378-1381; S. DOC. 24-5 (1836); SANDERSON, *supra* note 161, at 50; HUTCHINSON, *supra* note 167, at 24-30.

195. *Miln*, 36 U.S. at 107-10, 113 ("the power to regulate commerce is not exclusively in congress, but concurrent in the states; and that state laws are valid, unless conflicting").

196. *Id.* at 110-11 (the law "is not a commercial regulation in the sense contemplated in the constitution; but a police regulation"). Counsel argued that: "It has been the policy of the general government, to encourage the emigration of foreigners to this country. . . . [Congress has] the power to regulate the manner in which they shall be brought here, under the power to regulate commerce. . . . But when they once arrive in this country, they must submit to the poor laws of the state in which they land; and with which congress have nothing to do. These laws have always regulated them. . . ." *Id.* at 129.

197. *Id.* at 121.

198. *Id.* at 111 (discussing article 1, section 9 as showing "that the states reserved the power to admit or prohibit; and consequently, to regulate the admission"), 111-12 (discussing analogies to southern laws designed to stop "free negroes from being introduced among slaves"), 112-13 (discussing 1788 convict resolution as proving that "the admission of convicts may be prohibited, the mode of bringing passengers may

Miln's lawyers had little patience with the argument that attempted to justify the New York act by a history of similar legislation:

Let the array of state laws and state regulations, which has been presented by the counsel for the plaintiffs, be examined by these principles, and they will be found constitutional or void, as the examination will result. The number of these laws will not protect them, if they are obnoxious to the constitutional power of congress. They will all be in *pari delicto*, if they so interfere. No precedent will sanction unconstitutional laws. The argument, that a similar law of every state conflicts with the constitution, only shows the extent of the mischief, and the greater necessity for its cure.¹⁹⁹

They argued, instead, about future consequences. "The law of New York is a prohibition of emigration; and if carried into full effect will entirely prevent the entrance of all persons from abroad. . . ."²⁰⁰ Referring to the discussion of commerce from *Gibbons* that mentioned "transportation of passengers" and employing the phrase "passenger commerce," Miln's lawyers seemed baffled at what questions remained unanswered. The commerce power was exclusive, the New York law was "in direct opposition to the power given by the constitution to congress to regulate commerce," and they asserted, by the 1819 passenger act, Congress had "come in and occupied the ground." New York's law added regulations on "the subject of passengers" and therefore was unconstitutional.²⁰¹

Although the lawyers had failed to take Marshall's apparent invitation in *Gibbons* to argue expressly that passengers were not "articles of commerce," Justice Barbour was less reticent. Justice Barbour delivered the opinion of the Court, upholding the New York law. Justice Thompson wrote a concurring opinion.²⁰² The only dissenter, Joseph Story, invoked an eminent supporter by noting that "in this opinion, I have the consolation to know, that I had the entire concurrence, upon the same grounds, of that great constitutional jurist,

be regulated"), 114-115 (listing examples of state laws).

199. *Id.* at 119.

200. *Id.* at 120.

201. *Id.* at 116-21. Apparently unsure about the concept of the "police" power, they added that even if "regulations may be both those of police and of commerce," when "commerce is interfered with by the rules of police," such state interference is void.

202. Chief Justice Taney may have originally assigned the opinion to Justice Thompson. When several justices disagreed with Thompson's concurrent state power theory, Taney asked Justice Barbour to write a new majority opinion. BAXTER, *supra* note 171, at 92-95. Note, however, Carl Swisher's point that Thompson's opinion is written in the first person. SWISHER, *supra* note 7, at 364 n.25.

the late Mr. Chief Justice Marshall."²⁰³ On the issue of the relationship of federal to state power, each justice staked out a separate position: Barbour relying on state police power;²⁰⁴ Thompson wavering between state police power and concurrent state commerce power;²⁰⁵ and Story advocating

203. *Miln*, 36 U.S. at 161. The uncertainty apparent in *Miln* has not gone unnoticed. With respect to the federalism issue, one commentator has written:

It was clear that the Taney Court was composed of two wings on the commerce question, and probably of another, yet uncommitted segment. Several justices found an attractive alternative, one might say escape, in labeling the state law a regulation of police; there were some of these in each wing.

BAXTER, *supra* note 171, at 94-95. The disagreement over the Commerce Clause left *Miln* providing no clear precedent for the proper demarcation of a federal-state boundary.

204. Writing for the majority of the Court, Barbour advanced a police power thesis to uphold the New York law:

That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution . . . That, by virtue of this, it is not only the right, but the bounden [sic] and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends . . . That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.

Miln, 36 U.S. at 139. The New York law, therefore, was "not a regulation of commerce, but of police; and that being thus considered, it was passed in the exercise of a power which rightfully belonged to the states." To support his conclusion, Barbour argued that New York had possessed such power prior to the Constitution and that *The Federalist* No. 45 and *Gibbons* indicated that the states had not surrendered the power by ratifying the Constitution. Moreover, the act fell within the police power because it was a precautionary measure "against the moral pestilence of paupers, vagabonds, and possibly criminals," and the "evil of thousands of foreign emigrants arriving there." The police power being exclusive, conflict with federal commerce power was impossible. *Id.* at 130-43.

This article refers to the justices' theory as "police power" throughout the discussion. In *Miln*, however, the justices employed a variety of terms to refer to this power and the phrase tends to appear only when borrowed from Marshall's opinion in *Gibbons*.

205. Thompson accepted that the regulation involved commerce and state power. He noted that it had "in some measure" the "character of commercial regulations." *Id.* at 153. Because the law did not conflict with any federal statute, it was unnecessary to "fix any limits upon the legislation of congress and of the states" or "to decide,

exclusive federal commerce power.²⁰⁶ Yet amidst these disagreements over federalism arose the beginnings of a more profound disagreement over whether immigrants were "articles of commerce."

For the first time in a Supreme Court opinion, a justice chose to differentiate explicitly "persons" and "imported goods." Barbour's distinction of earlier commerce cases rested on this difference. According to Barbour, *Gibbons* had been about "vessels"; *Miln* was about "persons."²⁰⁷ In *Brown*, the question involved "imported goods"; however, in *Miln*, the "inquiry" was about a "right over persons." Barbour concluded: "[G]oods are the subject

definitively, whether the provisions of this law may be considered as at all embraced within the power to regulate commerce." Recalling the 1788 congressional convict resolution, Thompson asked whether "anything [can] fall more directly within the police power and internal regulation of a state, than that which concerns the care and management of paupers and convicts." He added that a similar law in New York had been in force for nearly forty years, other states had passed similar legislation, and "to pronounce all such laws unconstitutional would be productive of the most serious and alarming consequences; and ought not to be done, unless demanded by the most clear and unquestioned construction of the constitution." Thompson's conclusion that the New York law was either a police regulation or an exercise of concurrent state commerce power, rested on the remnants of statutes passed to regulate the commerce in convicts and indentured servants. *Id.* at 143-53.

206. To Story, the commerce power was exclusive, not concurrent. The 1819 passenger act authorizing the introduction of passengers into the country represented "a complete exercise of its power over the subject, as well in what is omitted as in what is provided for." Thus, whatever restrains or prevents the introduction or importation of passengers or goods into the country, authorized or allowed by congress; whether in the shape of a tax or other charge, or whether before or after their arrival in port, interferes with the exclusive right of congress to regulate commerce. Although Story acknowledged, "in the most unhesitating manner," the existence of the police power, he asserted that a state could not "trench upon the authority of congress in its power to regulate commerce." *Id.* at 153-61.

Story had advanced a similar position in his COMMENTARIES ON THE CONSTITUTION, suggesting that the "same means" may be resorted to by the state under its police power and the federal government under its commerce power. In *Miln*, however, he altered his theory. He may have realized that if the state could use the "means" of regulation of commerce to protect itself, then Barbour's opinion might be correct and the federal commerce power would be limited. Thus, in *Miln*, Story suggested that the state's police power authorized certain ends—health, quarantine, poor laws—but that the state could not use laws which regulated commerce as a means to reach these ends. "A state cannot make a regulation of commerce to enforce its health laws, because it is a means withdrawn from its authority." JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 514-15 (reprint ed. 1970) (1833).

207. *Miln*, 36 U.S. at 135-36.

of commerce, the persons are not." Warming to the subject, he stated that Congress could regulate imported goods after they were landed because "they were the subjects of commerce":

But how can this apply to *persons*? They are not the subject of commerce; and, not being *imported goods*, cannot fall within a train of reasoning founded upon the construction of a power given to congress to regulate commerce . . .²⁰⁸

Despite the strength of these statements, Barbour himself was not completely convinced that his conclusion would be accepted. His opinion also attempted to distinguish between "passengers" who could be "objects of commerce," and "persons" who cease to be "objects of commerce" and therefore can be regulated by the states.²⁰⁹ Barbour was willing to express his perception that persons were not goods, but unwilling to base his result completely on it.

Justice Story's dissent, expressing disbelief that persons were not commerce, may explain Barbour's hesitation. Story quoted extensively from Marshall's statements in *Gibbons* and concluded that "the regulation of passenger ships, be in truth a regulation of trade and commerce." Implicitly mocking Barbour's efforts at distinction, Story noted, "this language is the more impressive, because the case . . . was that of a steamboat, whose principal business was the transportation of passengers."²¹⁰ *Brown* supported the same conclusion if "instead of the language respecting the introduction and importation of goods, we merely substitute the words respecting the introduction and importation of passengers."²¹¹ Furthermore, he pointed out that, had the requirements of the New York statute been found in a congressional act, "it would not have been doubted, that they were regulations of passenger ships engaged in foreign commerce."²¹² Story saw no reason to alter what he believed was the background assumption that people were "articles of commerce."

The disagreement on the Court between those justices who continued to believe that people were "articles of commerce," and the new position hesitatingly advocated by Barbour that people were not imported goods was

208. *Id.* at 136-37 (emphasis added).

209. *Id.* at 138-39. If the statute was a commercial regulation, no conflict existed with the federal passenger act because the federal act affected "the passengers, whilst on their voyage, and until they shall have landed." The New York law, however, only applied "when they have ceased to have any connection with the ship, and when, therefore, they have ceased to be *passengers*." *Id.* at 137-38 (emphasis added).

210. *Id.* at 155.

211. *Id.* at 160-61.

212. *Id.* at 156.

highlighted by the subsequent appearance of Justice Baldwin's missing opinion. In late 1837, Baldwin published a volume of his opinions, including one missing from the official report in *Miln*, in a treatise discussing the nature of the relationship between the United States government and the states.²¹³ Baldwin's oblique explanation for the volume hinted at his discomfort at discovering that the Court's decisions were so dependent on the Court's composition. After the recent changes in the Court, Baldwin suddenly found himself in a comfortable majority of like-minded justices.²¹⁴

Baldwin sided with Barbour in the result. The *Miln* opinion appearing in the volume, however, demonstrated his reluctance—perhaps shared by many on the Court who agreed with the result—to endorse the idea that people were not "articles of commerce."²¹⁵ One statement by Baldwin seemed complementary to those of Barbour. Baldwin noted that "pauper[s] imported from a foreign nation or another state" are not "articles of merchandise or traffic, imports, or exports."²¹⁶ Unlike Barbour, however, Baldwin could not bring himself to argue that "persons" were not commerce. Indeed, he recognized that people often were part of commerce. He accepted that the "vessel" with passengers on it in *Gibbons* had been a part of commerce.²¹⁷ And he acknowledged that at some point "the vessel, the cargo, the crew, or

213. The treatise was modestly titled HENRY BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES DEDUCED FROM THE POLITICAL HISTORY AND CONDITION OF THE COLONIES AND STATES, FROM 1774 UNTIL 1788 AND THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES TOGETHER WITH OPINIONS IN THE CASES DECIDED AT JANUARY TERM, 1837, ARISING ON THE RESTRAINTS ON THE POWERS OF THE STATES (reprint ed. 1970) (1837). The volume contained a long introductory essay and Baldwin's opinions in *Briscoe*, *Charles River Bridge*, *Poole*, and *Miln*. *Miln* appears at 181-97. Baldwin's speed in publishing the volume is quite astounding. All four cases had been argued in January 1837 and the book was published the same year.

214. He stated that when the four cases had originally been heard he had been in the minority or bare majority. With the change in the Court, he found himself comfortably in the majority. "Placed in a position as peculiar now as it was then and since," Baldwin noted that he felt "called upon to defend it." *Id.* at 2. Baldwin's mode of defense had an additional purpose. He sought to base Supreme Court interpretations of the Constitution on common law principles rather than "books, essays, arguments, opinions, speeches, debates in conventions and legislative bodies, by jurists and statesmen, and by some who were neither." *Id.* at 3.

215. Justice Thompson's opinion is consistent with Baldwin's approach. See *Miln*, 36 U.S. at 143-53.

216. BALDWIN, *supra* note 213, at 185.

217. *Id.* at 186. Justice Wayne would later argue that Baldwin had believed persons to be commerce.

the passengers on board" were in "commerce."²¹⁸ Pulled in both directions, Baldwin was left to insist on a distinction between "paupers" on land and "persons" in commerce. Commerce could not "embrace" paupers.²¹⁹ The reason to him was apparent:

To my mind there can be no such cause for discriminating between an imported and a domestic pauper; one is as much an article of commerce as another, and the same power which can force them into a state from a vessel, can do it from a wagon, and regulate their conveyance on the roads or canals Laws excluding convicts and paupers are as necessary to preserve the morals of the people from corruption²²⁰

In order to protect states' rights to exclude domestic paupers, Baldwin was willing to allow them to exclude "imported" paupers. But, as his very use of "imported" demonstrated, he still perceived most persons as "articles of commerce."²²¹

Ironically, Baldwin, whose entire treatise was designed to refute the relevance of current politics, revealed the reality of the Court's situation. It was rapidly becoming impossible to maintain both that all people were "articles of commerce" and to continue to uphold state power to exclude certain people. Baldwin warned that certain kinds of state laws "must stand or fall together, or some arbitrary unintelligible distinction must be made between them, which is neither to be found in the constitution, or decisions of this Court."²²² Baldwin's prediction of an "arbitrary unintelligible distinction" soon would prove true as the Court moved towards explicit adoption of Barbour's argument that persons, at least when they were white, were not articles of commerce.

C. Groves: The Reason for Disagreement—Slavery

The move occurred because of growing tensions over slavery. In 1841, a slavery case, *Groves v. Slaughter*,²²³ clarified that the Justices' views over

218. *Id.* at 188; *see id.* at 184.

219. *Id.* at 184.

220. *Id.* at 194.

221. *Id.* Baldwin ended by insisting that the states retained power over internal commerce.

222. Baldwin's suggestion was to distinguish "internal commerce of a state" from other categories of commerce. He argued that the states had never surrendered their power over internal commerce. *Id.* at 184. The quote actually refers to a slightly different arbitrary distinction.

223. 40 U.S. (15 Pet.) 449 (1841). Under traditional analysis, *Groves* could be distinguished as an interstate commerce case.

whether persons were articles of commerce, had become inextricably bound to perceptions of distinctions between "persons" and black slaves. *Groves* involved a claim by a seller of imported slaves that he should be able to collect the money owed on a defaulted note used to buy the slaves, despite the fact that Mississippi's constitution prohibited importation of slaves. The Court decided 5-2 in favor of the seller under the theory that the state constitutional provision was not self-executing. The Court thereby technically avoided the commerce issue.²²⁴

The case, however, had been largely argued as a case about commerce. Indeed, the lengthy arguments of the lawyers had focused on whether or not slaves were commerce. The Mississippi constitutional provision had referred to "slaves . . . as merchandise." None of the lawyers disputed this characterization. Disagreement arose over whether the fact that slaves were property and "merchandise" meant that they were "articles of commerce" such that Congress could regulate their transportation. On this point, the lawyers agreed that the case presented "the most" "grave and important question" ever brought to determination before the Court.²²⁵

From Mississippi, Robert J. Walker argued that slaves were property but not "articles of commerce." Walker accepted that states could declare slaves merchandise and property.²²⁶ Yet these laws did not mean that slaves became "objects of commerce." Walker distinguished between "commerce in merchandize," to be regulated by congress, and slavery, which was a "[c]ommerce, if it may be so called, in persons" that was "local and peculiar."²²⁷ Employing part of a southern defense of slavery that would soon become popularized by George Fitzhugh, Walker explained that the abolitionists had too long persisted uncontradicted in the "radical error" that "slaves are designed to be deprived . . . of the qualities and characters of persons . . . and to degrade them in all things to the levels of chattels, of inanimate matter."²²⁸ Walker added,

224. *Groves*, 40 U.S. at 449; see SWISHER, *supra* note 7, at 365-70. The dissents were apparently not clear. At one place, the reporter noted that Story, Thompson, Wayne, and McKinley concurred with the Court. *Groves*, 40 U.S. at 508. Later, however, the reporter noted that Story and McKinley dissented. *Id.* at 517; see SWISHER, *supra* note 7, at 367.

225. *Groves*, 40 U.S. at 647.

226. The argument of Walker of Mississippi in *Groves* appears at great length in an appendix. For plaintiffs, see *id.* at 616 (declaring "slaves" as "vendible articles"), 639 (comparing slaves to cases involving ginger, butter, corn, and coal), 650 (comparing the regulation of the transportation of slaves to "all other articles of commerce"), 651-52 (discussing laws defining slaves as property to be "not regulations of commerce, but of slavery").

227. *Id.* at 650.

228. *Id.* at 653.

To call them chattels or real estate, no more makes them in reality land, or merely inanimate matter, than to call the blacks of the north freemen, makes them so in fact. When the constitution of Mississippi, and laws made in pursuance thereof, require that slaves shall be treated with humanity, command that they shall be well clothed and fed, and that unreasonable labor shall not be exacted, are these provisions applicable to a mere chattel, which the owner may mutilate or destroy at pleasure? No!

Citing *Miln*, he pointed out that the Court had "decided, that in contemplation of the constitution of the Union, persons 'are not the subject of commerce.'"²²⁹

Why was an advocate of southern slavery willing to use *Miln* to argue that persons were not "articles of commerce"? Walker made the reason clear. He explained that the northern abolitionists had a "strangely inconsistent" argument. They

say men are not property, and cannot be property, by virtue of any laws of congress or of the states; and yet, that as such, commerce in them among the states may be regulated by congress and by congress alone.²³⁰

If calling slaves "articles of commerce" would permit Congress, not the southern states, to regulate slavery, Walker would insist that slaves actually were "persons."

This argument left his opponents, Henry Clay and Daniel Webster, with the task of attempting to argue that slaves were "articles of commerce" without appearing to be proslavery activists. Both men attempted to distinguish their beliefs from those of Walker. Clay noted that, regardless of the decision, the case would not affect slaves in Mississippi. He stated, however, "[i]t would be gratifying to those who love freedom, if the negroes were free."²³¹ Webster took a slightly different approach, dramatically asking how had Mississippi chosen to prohibit the sale of slaves as merchandise.

229. *Id.* at 653; *see id.* at 668-69 ("the power of congress to regulate commerce does not extend to 'persons'"). Henry Gilpin, the Attorney General, siding with Walker, agreed that *Miln* demonstrated that "the regulation of commerce is intended to apply to 'goods,'—to the articles that are strictly merchandize." *Id.* at 467.

230. *Id.* at 649; *see id.* at 647 (discussing abolitionists' petitions advocating that congressional power over interstate commerce is exclusive). Walker argued in the alternative that under *Miln* the power to exclude paupers as dangerous articles would permit a state to exclude dangerous slaves. *Id.* at 665-69. Gilpin also argued, in the alternative, that even if it were a commercial regulation, Mississippi could stop the introduction of slaves under the police power or concurrent commerce power. *Id.* at 468-69.

231. *Id.* at 487-88.

"Emancipated? No such provision! The slaves were not to be set free."²³² But having made some declaration of apparent sympathies, the two men went on to state that slaves were property and merchandise and, therefore, "articles of commerce" under the commerce clause. As Clay explained, "the right of congress to regulate commerce between the different states" extended "to the regulation of the transportation of slaves . . . as merchandise."²³³

With the issue explicitly framed as one about an abolitionist position, the majority of the Court declined the invitation to settle the debate. Justice Thompson, taking advantage of Justice Barbour's death, avoided the question Barbour had opened of whether persons were "articles of commerce." But the "pressure for self-expression . . . was too much for Justice McLean."²³⁴ McLean, whose antislavery convictions were well known,²³⁵ wrote a separate concurrence. Yet McLean's concurrence, which attempted to place an abolitionist spin on the case, revealed how complicated slavery had made the issue.

McLean wanted to differentiate his legal perception that persons were "articles of commerce" from the southern slavery perception that slaves were property and merchandise and also from Walker's almost hypocritical claim that considering slave "persons" as "articles of commerce" for Commerce Clause analysis was dehumanizing. McLean began by agreeing with Webster and Clay. McLean argued that commerce was "intercourse" and "as regards this intercourse . . . it is immaterial, whether the cargo of the vessel consists of passengers, or articles of commerce."²³⁶ The power to regulate this commerce, as *Gibbons* had decided, was "exclusively vested in congress."²³⁷ He then disagreed with Walker. McLean asserted that his conclusion was not inconsistent with a belief that slaves were persons. "The constitution treats slaves as persons" and the fact that some states considered slaves "merchandise" "cannot divest them of the leading and controlling quality of

232. *Id.* at 492.

233. *Id.* at 488-89.

234. SWISHER, *supra* note 7, at 368. Swisher noted that in *Miln*, "Wayne and McLean, who wrote nothing to explain their positions, thereafter in case after case heard counsel quote as the opinion of the Court the statement that persons were not subjects of commerce, much to their discomfort as nationalists." *Id.* at 364. McLean's discomfort may have equally arisen from his antislavery position.

235. Frank Otto Gatell, *John McLean*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969: THEIR LIVES AND MAJOR OPINIONS 535, 544-45 (Leon Friedman & Fred L. Israel eds., 1980); FRANCIS P. WEISENBURGER, THE LIFE OF JOHN MCLEAN: A POLITICIAN OF THE UNITED STATES SUPREME COURT 188-95 (1937); ROBERT COVER, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS 243-49 (1975).

236. *Groves*, 40 U.S. at 506.

237. *Id.* at 504.

persons."²³⁸ Ironically, however, McLean concluded by agreeing with Walker's conclusion: slavery was "local in its character" and laws regulating admission of slaves were inherent to state sovereignty. McLean's concern, unlike Walker's, was with the northern states' right to abolish and prohibit slavery altogether. McLean could see no logic that would permit exclusive congressional power over a commerce including slaves but that would not also forbid Ohio's antislavery laws.²³⁹

The tension in *Groves* over whether slaves and persons were "articles of commerce" also appeared in Baldwin's opinion. A proslavery northerner,²⁴⁰ Baldwin had no doubt that Congress had exclusive power over commerce and that the states had exclusive power over regulations of police, including the entry of slaves. But unlike McLean and even Walker, Baldwin refused to consider slaves "persons" in order to reach this conclusion. Other justices, Baldwin noted, "consider the constitution as referring to slaves only as persons . . .; they do not consider them to be recognized as subjects of commerce." Baldwin explained that he "could not acquiesce." Echoing the solitary position he had expressed in his treatise, he stated: "That I may stand alone among the members of this court, does not deter me from declaring that I feel bound to consider slaves as property."²⁴¹ Baldwin felt so strongly that, for five pages, he delineated all the evidence that demonstrated that slaves were "articles of commerce."²⁴² He proclaimed "wherever slavery exists, by the laws of a state, slaves are property in every constitutional sense, and for every purpose, whether . . . as articles of commerce." Again, Baldwin's purpose was oblique, but it may have been an early attempt to suggest that slaves would be considered property under the Constitution. He noted that, although a state could prohibit importation of slaves under its police powers, if "no object of police is discernible,"²⁴³ then the power of Congress was to be "conservative in its character, for the purpose of protecting the property of the citizens of the United States."²⁴⁴

Had the only concern on the Court in 1841 been of federalism, McLean and Walker, Baldwin and Clay might have agreed. All appeared to accept that the states could regulate the admission of slaves: antislavery McLean carefully insisted on protecting the rights of antislavery states to prohibit

238. *Id.* at 507. Webster had explicitly argued the other side: "The constitution recognises slaves as property." *Id.* at 495.

239. *Id.* at 507-8.

240. See Gatell, *supra* note 235, at 571, 579.

241. *Groves*, 40 U.S. at 513.

242. *Id.* at 513-15.

243. *Id.* at 516.

244. *Id.*

slavery; proslavery Walker also claimed that Congress could not regulate slavery; and even the erratic Baldwin seemed to arrive near the same place.

But their disagreement was less one of federalism than of the perception of what was a "person"—were Africans and African-Americans held as slaves, "articles of commerce" or "persons?" No one lined up along an expected line. Arguing for slaves as "articles of commerce" were northerners who moderately opposed slavery such as Webster and Clay, as well as those who were proslavery such as Baldwin. Arguing that slaves were "persons" were, to some degree, proslavery Walker and antislavery McLean. Walker believed slaves were "persons" in order to get them out of the Commerce Clause and keep them slaves; McLean believed they were "persons" in order to get them out of slavery altogether. *Groves* demonstrated that the Court would not ignore the conflict between the statement in *Gibbons* that persons were "articles of commerce" and *Miln*'s statement that they were not.

D. The Passenger Cases: Decisive Disagreement

The Court soon acknowledged that the conflict would not be ignored; unfortunately neither could it be resolved. By 1849, it became apparent that the issue would prevent agreement in any case involving persons and commerce. Whether "persons"—white British and European immigrants—were "articles of commerce" became the central bar to deciding immigration cases from Boston and New York. *The Passenger Cases* involved collection of money and bonds from shipmasters. As in *Miln*, absences and deaths on the Court forced postponements and multiple rearguments between 1845 and 1848. When the Court's 5-4 decision in the case was finally published in 1849, arguments of counsel and of the justices occupied close to three hundred pages of the *United States Reports* volume.²⁴⁵ The laws were invalidated. Disagreement, however, was so profound among the justices that the Supreme Court Reporter wrote the pointed headnote: "there was no opinion of the court."²⁴⁶

The two cases reached the Court on the heels of recent national activity involving persons and commerce. With respect to immigration, several new congressional acts had been passed to ensure better regulation of passenger

245. *The Passenger Cases* (Smith v. Turner, Norris v. Boston), 48 U.S. (7 How.) 283 (1849) (McLean, Wayne, Catron, McKinley, Grier in majority; Taney, Daniel, Nelson, Woodbury in dissent); see SWISHER, *supra* note 7, at 383-84. Swisher notes that Chief Justice Shaw had upheld the Boston statute as a police measure by citing *Miln* and "Justice Barbour's statement that persons were not the subject of commerce." *Id.* at 383. The arguments were not given in full by the reporter. *Id.* at 283.

246. *The Passenger Cases*, 48 U.S. at 283.

ships.²⁴⁷ In the states, New York and Massachusetts had begun to centralize control over taxes and duties received from incoming alien passengers.²⁴⁸ These activities respecting immigrants had a new context. The 1840s saw an increase in immigrants, particularly those from Ireland, as famine, crop failure, and potato blight sent many overseas.²⁴⁹ Slavery also became more contentious. In 1843, the House Committee on Commerce concluded that state legislation restricting African and African-American seamen from entering southern ports violated the Commerce Clause.²⁵⁰ United States expansion into the Northwest and the Southwest made Oregon, Texas, and Mexico fuel for sectional conflict. The 1846 introduction of the Wilmot Proviso, which advocated barring slavery in the territories acquired from Mexico, kept slavery before the nation.²⁵¹

Although the Reporter chose not to reprint the many arguments in the case, his synopsis demonstrates that the problem of whether persons were "articles of commerce" haunted every argument. An examination of merely two of the lawyers' positions serves to illustrate. John Van Buren stated that "passengers voluntarily immigrating into the country by sea or land can in no sense be called 'imports.'"²⁵² In opposition, Webster argued once again that "commerce included the carrying of passengers."²⁵³

In the opinions of the justices, the debate over persons as "articles of commerce" was the critical issue. As Wayne stated, "the court means now to decide" that "the commerce of the United States includes an intercourse of persons, as well as the importation of merchandise."²⁵⁴ It was on this point that the five justices in the majority—McLean, Catron, Grier, McKinley, and Wayne—seem to have agreed. All insisted that persons were "articles of commerce." Nevertheless, their profound disagreements would prevent this consensus from clearly emerging.

McLean simply asserted, and repeated throughout his opinion: "[t]hat the transportation of passengers is a part of commerce is not now an open question."²⁵⁵ He explained that "as a branch of commerce, the transportation

247. HUTCHINSON, *supra* note 167, at 34-38.

248. Klebarer, *supra* note 8, at 274-77.

249. JONES, *supra* note 107, at 92-93.

250. SWISHER, *supra* note 7, at 381.

251. See generally DAVID M. POTTER, *THE IMPENDING CRISIS, 1848-1861* (1976).

252. *The Passenger Cases*, 48 U.S. at 290.

253. SWISHER, *supra* note 7, at 385.

254. *The Passenger Cases*, 48 U.S. at 412.

255. *Id.* at 401. McLean quoted Marshall's statement in *Gibbons* that no distinction existed between transporting men for hire and property. *Id.* He repeated this point later in the opinion: "the transportation of passengers . . . [is] a branch of

of passengers has always given a profitable employment to our ships."²⁵⁶ Distinguishing *Miln* (which he admitted he had assented to) as involving only a shipmaster's report of names, McLean concluded that state duties and taxes on foreigners were void under the exclusive commerce power.

Catron and Grier—whose views on slavery were respectively more moderate than many proslavery southerners and more conservative than many moderate antislavery northerners²⁵⁷—joined each other's opinions. McKinley, who "remains virtually unknown," agreed with Catron.²⁵⁸ These three agreed that persons were "articles of commerce."²⁵⁹ Indeed, all waxed rhapsodic over immigration, declaring it a "cherished" policy of the government.²⁶⁰

commerce, of which there can be no doubt. . . ." *Id.* at 405.

256. *Id.* at 401.

257. Grier was from Pennsylvania and "conformed to the standard pattern of most north Democrats of his era"—he was antiabolitionist. Frank Otto Gatell, *Robert C. Grier, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1978: THEIR LIVES AND MAJOR OPINIONS* 873, 877-80 (Leon Friedman & Fred L. Israel eds., 1980); See Marc M. Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoner*, 70 TUL. L. REV. 1, 44 (1995). Catron was, ironically, also from Pennsylvania but moved to Tennessee. Catron, who had supported southern slavery in court decisions, was also a confirmed Unionist and for federal power. See Frank Otto Gatell, *John Catron, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1978: THEIR LIVES AND MAJOR OPINIONS* 737, 745-48 (Leon Friedman & Fred L. Israel eds., 1980).

258. Frank Otto Gatell, *John McKinley, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1978: THEIR LIVES AND MAJOR OPINIONS* 769, 777 (Leon Friedman & Fred L. Israel eds., 1980). McKinley was from Alabama. Carl Swisher referred to him as the least outstanding member of the Taney Court. See SWISHER, *supra* note 7, at 67.

259. See *The Passenger Cases*, 48 U.S. at 442, 444, 447, 450, 451 (Catron); 462, 463 (Grier). In a concurrence, McKinley focused on the migration and importation clause, concluding that "two separate and distinct classes of persons" were the subjects of the clause. *Id.* at 453. Both are "subjects of commerce." *Id.* Slaves, however, "are not immigrants, and had no exercise of volition in their transportation from Africa to the United States." *Id.* Immigrants, on the other hand "could remove at pleasure." *Id.* at 454.

260. Catron noted that "the policy of drawing hither aliens . . . has been cherished by Congress with rare steadiness and vigor" and has "filled up" the country with a "respectable population, both physically and mentally." *Id.* at 440. Catron made clear what "physically" referred to: "We have invited to come to our country from other lands all free white persons, of every grade and of every religious belief." *Id.* Grier's remarks were similarly focused on race. He noted that it was "the cherished policy of the general government to encourage and invite Christian foreigners of our own race to seek an asylum." *Id.* at 461. McKinley felt little

Wayne likewise declared that people were "articles of commerce." As a Georgian, Wayne accepted slavery under the Constitution, but he became a Unionist during the Civil War.²⁶¹ He argued that section 9 "recognizes that other persons as well as slaves may be the subjects of importation and commerce."²⁶² So fiercely did Wayne believe that persons were "articles of commerce" that he was willing to deny that Barbour's statement for the majority in *Miln* was binding law. Wayne pointed out that any time *Miln* had been cited "for the purpose of showing that persons are not within the regulating power of Congress over commerce," he had stated that the point was not decided.²⁶³ Wayne explained that "especially the declaration that persons were not subjects of commerce" did not have "the assent of a majority of the members of this court."²⁶⁴ He acknowledged that this precise question of whether commerce included "an intercourse of persons and passengers in vessels" had been raised in *Miln*.²⁶⁵ But, Wayne argued, Barbour's majority opinion had never been assented to by Baldwin. Baldwin had read the opinion late and objected "on account of what was said in it concerning . . . what was commerce." Barbour unfortunately had already left Washington and nothing could be altered. Wayne consequently counted Story, Baldwin, McLean, Thompson, and himself as objecting to the view that persons were not the subjects of commerce.²⁶⁶ With five justices in dissent on the point, Wayne thought Barbour's statement was not law.²⁶⁷ What the five—or at least three—justices disagreed over involved slavery.²⁶⁸ Grier

sympathy towards New York City, noting that if "by reason of commerce, a burden is thrown upon our commercial cities, Congress should make suitable provisions for their relief." *Id.* at 408. He believed that to "encourage foreign emigration was a cherished policy of this country." *Id.* at 401.

261. Frank Otto Gatell, *John M. Wayne*, in 1 *THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1978: THEIR LIVES AND MAJOR OPINIONS* 601, 607-10 (Leon Friedman & Fred L. Israel eds., 1980).

262. *The Passenger Cases*, 48 U.S. at 414.

263. *Id.* at 436. Some of Wayne's ferocity appears to have come from his belief that *Gibbons*, "not surpassed by any other case in the reports of courts," had been decided by "giants" and "rules the case." *Id.* at 437.

264. *Id.* at 430.

265. *Id.* at 431.

266. *Id.* at 432.

267. *Id.* at 433. According to Wayne, when a judge mistakenly agrees to "dictum" but disagrees and then publishes his opinion, it cannot be "law." The accuracy of Wayne's account of Baldwin's position is difficult to evaluate. Baldwin's opinion seems less supportive than Wayne suggests.

268. Catron and McKinley remained silent on whether or not the states might have the police power to exclude. McKinley's concurrence was joined by Catron. McKinley noted that after 1808, "the power of Congress over the whole subject of

was careful to preserve under the police power an ability of states to exclude some people. He was even more careful to remark on whom he thought the states could exclude: "lunatics, idiots, criminals, or paupers" and "free negroes" who "endangered" "domestic security."²⁶⁹ Torn, like Grier, by the politics of slavery, Wayne also would permit the states to exclude certain people: "[P]aupers, vagabonds, and fugitives from justice." Moreover, those who are "from a common ancestry and country, of the same class of men" as "slaves," he explained, "are not within the regulating power that the United States have over commerce."²⁷⁰ McLean seemed to have supported a similar theory in *Groves*. Now, however, he appeared less willing to find exceptions to exclusive federal commerce power. The police power of a state was "only" to "be exerted under peculiar emergencies and to a limited extent."²⁷¹ McLean's move towards federal power was consistent with the belief he expressed in 1848 letters that the Constitution prohibited slavery in free states and the territories.²⁷²

To the four dissenting justices—Taney, Daniel, Nelson, and Woodbury—persons, particularly immigrants, were simply not "articles of commerce." Taney's and Daniel's extreme proslavery impulses and efforts to distinguish slaves and free blacks from whites would later become even more

migration and importation was complete." *Id.* at 454. This power belonged "exclusively to Congress." *Id.* The "perplexing" question of where this power ended and the state begun was answered quickly. Passengers "can never be subject to State laws until they become a portion of the population." *Id.* at 455.

269. *Id.* at 457.

270. *Id.* at 426; *see id.* at 427 (arguing that the United States could not introduce "emancipated Negroes from the West Indies"), 428.

271. *Id.* at 408. McLean was somewhat contradictory on the police power aspect. Earlier he had stated that a state could guard its citizens against diseases and paupers. *Id.* at 406. Yet at the end of his opinion he implied that Congress would make "suitable provisions" for relief of seaboard ports if they were forced to face an increase in pauperism, implying that they could do nothing themselves. *Id.* at 408.

272. Gatell, *supra* note 235, at 544; WEISENBURGER, *supra* note 235, at 189. This theory is supported by McLean's oblique comment suggesting that some had felt that *Groves* indicated that "slaves may be introduced into the Free States." McLean had been the sole dissenter in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 658-73 (1842). His theory in *Prigg* was that in a free state "every man, black or white, is presumed to be free." *Id.* at 671. In 1848 he had come to the conclusion that had been reached in *Somerset*, that slavery only existed where declared by positive law. If he had believed that Congress was without authority to declare slavery, he may have come to believe that Congress could free slaves. He made this statement in letters discussing his possible candidacy for the Free Soil (antislavery) presidential nomination. He would later embrace this theory in his dissent in *Scott v. Sandford*, 60 U.S. (19 How.) 393, 529 (1856).

apparent in *Scott v. Sandford* when both explicitly stated that African-Americans could not be citizens.²⁷³ For both, *Miln* had decided this case²⁷⁴ and Barbour's statement was good law.²⁷⁵ The two expressed outrage that anyone could believe that white "freemen" were "articles of commerce." Taney stated "*imports and importation*" "have uniformly been applied to articles of property, and never to passengers voluntarily coming."²⁷⁶ Daniel noted that "the term imports is justly applicable to articles of trade proper,—goods, chattels, property, subjects in their nature passive and having no volition,—not to men whose emigration is the result of will." It would be a "perversion" to suggest otherwise.²⁷⁷ Having proclaimed that white immigrants and slaves were in entirely different categories, Taney and Daniel also made clear that the states could exclude persons, most importantly freed slaves, under the police power.²⁷⁸

273. *Scott*, 60 U.S. (19 How.) at 404-7 (Taney), 490 (Daniel); see Alfred L. Brophy, *Let Us Go Back and Stand Upon the Constitution: Federal-State Relations in Scott v. Sandford*, 90 COLUM. L. REV. 192, 201-3 (1990); Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment*, 22 FLA. ST. L. REV. 591, 619-20 (1995); Finkelman, *supra* note 7, at 975. Ironically, but perhaps unsurprisingly, they would be joined by Wayne who had so strenuously denied that persons were not "articles of commerce." *Id.* at 490. Nelson wrote no opinion in the Passenger Cases. In *Scott* he would take a less extreme position than Taney and Daniel, by refusing to discuss citizenship. See Frank Otto Gatell, *Samuel Nelson*, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1978: THEIR LIVES AND MAJOR OPINIONS 817, 824-25, 878 (Leon Friedman & Fred L. Israel eds., 1980).

274. *The Passenger Cases*, 48 U.S. at 477 (Taney stating that "the court decided that passengers clearly were not imports"); 515 (Daniel stating that "this case is brought, not only within the reasoning, but within the literal terms" of *Miln*); 524 (Woodbury).

275. Taney and Daniel even rebutted Wayne's claim that the decision was not binding by recounting different facts about the decision process in *Miln*. See *id.* at 487-89 (Taney); 515-16 (Daniel).

276. *Id.* at 476, 477-78, 480, 492-94 (emphasis added). Taney's concern was with the possibility that, if they were imports, then there could be no duty levied upon them.

277. *Id.* at 506. Daniel insisted that "alien passengers, rational beings, freemen . . . never can, without a singular perversion, be classed with the subjects of sale, barter, or traffic." *Id.* Daniel was fascinated by etymology. He began by noting that "commerce" comes from "the Hebrew." *Id.* at 501. Later Daniel interpreted "import" as "within the gate." *Id.* at 504-5.

278. *Id.* at 474 (Taney arguing against a theory that would permit emancipated West Indian slaves to reside in Southern states "ultimately leading to the most painful consequences"); 477 (Taney); 507 (Daniel arguing that commerce power needed to be interpreted to avoid the "mischief" of believing that the British could land "cargoes of

The New Hampshire-born Levi Woodbury also dissented. Woodbury's political sympathies were "enigmatic." He was "suspected of being a Presidential candidate, a Northern man with pronounced Southern leanings, or at least, leanings toward slavery."²⁷⁹ Like Taney and Daniel, Woodbury distinguished "freemen coming of their own accord" from "men or 'persons' who are property and passive, and brought in against their will or for sale as slaves,—brought as an article of commerce, like other merchandise."²⁸⁰ Unlike Taney and Daniel, Woodbury seemed to imply that some whites, perhaps convicts and redemptioners, could be in the latter category if "brought in as property,—as slaves, unwilling or passive emigrants."²⁸¹ Woodbury's acceptance that a few white people might be in the "imported" category did not change his underlying desire to ensure that the states had the power to exclude "cargoes of shackled slaves,"²⁸² and, "what is still more common in America, in Free States as well as Slave States, [to] exclude colored emigrants, though free."²⁸³ To Woodbury, if slaves and free blacks were excludable, than so too were immigrants.²⁸⁴ His solution—a theory of concurrent commerce power—would be adopted in 1851, after his death.²⁸⁵

The assumption that people were "articles of commerce" had turned half-circle. Once indentured servants and slaves had been perceived to be articles of commerce. By the eve of the Civil War, this assumption was explicitly and heatedly contested. The deep pro-slavery sentiments of some justices meant that Congress could not control immigration. Such a conclusion would necessitate labeling white passengers "articles of commerce." To these

negroes from Jamaica, Hayti, or Africa").

279. Swisher, *supra* note 7, at 235; Frank Otto Gatell, *Levi Woodbury, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1978: THEIR LIVES AND MAJOR OPINIONS* 843, 849-53 (Leon Friedman & Fred L. Israel eds, 1980).

280. *The Passenger Cases*, 48 U.S. at 534-35.

281. *Id.* at 535; *see id.* at 541 ("slaves are subjects of commerce, as they often are" vs. "free passengers"). Interestingly, Woodbury suggested that "migration" might have been intended to cover "slaves when regarded as persons" or "others, such as convicts and redemptioners who came against their will, or in a *quasi* servitude." *Id.* at 542.

282. *Id.* at 525; *see id.* at 540-41, 543-44, 566-67. Woodbury stated that "if Congress . . . can prohibit other persons as well as slaves from coming into States, they can of course allow it, and hence can permit and demand the admission of slaves." *Id.* at 542.

283. *Id.* at 425.

284. *Id.* at 550 ("It is a mistaken view to say, that the power of a State to exclude slaves, or free blacks, or convicts, or paupers, or to make pecuniary terms for their admission, may be one not conflicting with commerce, while the same power, if applied to alien passengers coming in vessels, does conflict.").

285. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

justices, such a label would reduce white passengers to the status of slaves. The political fears of other justices about states being required to admit free blacks or slaves fractured any consensus for a decision stating that immigrants were "articles of commerce." Indeed, this complexity may account for the Reporter's refusal to accept Wayne's statement that at least five justices had concluded that persons were "articles of commerce." The circle would be turned again, not by judicial reasoning, but by war.

VI. IMMIGRANTS ARE "ARTICLES OF COMMERCE"

The Civil War and Emancipation began to change the perception that white immigrants could not be "articles of commerce." With the approval of the Thirteenth Amendment in December 1865, no longer could people actually be held in slavery or involuntary servitude.²⁸⁶ The 1866 congressional approval of the Fourteenth Amendment similarly emphasized that those born within the United States must be considered "persons."²⁸⁷ The potential effect of these statements about "persons" became evident in 1867 when the Supreme Court decided *Crandall v. Nevada*, a case involving interstate railroads. Justice Miller described the debate in *The Passenger Cases* between those who believed that "import" referred to "persons as well as to merchandise" and those who thought it "had exclusive reference to slaves, who were property as well as persons. . . ."²⁸⁸ After implying that "citizens" at least could not be "imports," the Court struck down the tax on interstate travel without resolving the question of whether persons—be they citizens or migrating foreigners—were "articles of commerce." When the Court returned to the question almost a decade later, the Fourteenth Amendment had been ratified and the Supreme Court had begun its role as the Amendment's interpreter.²⁸⁹

These same years that saw legal language emphasizing that African-Americans formerly held as slaves were "persons," also saw the rebirth of forms of indentured servitude. In the Southwest, when peonage reappeared,

286. U.S. CONST. amend. XIII; see ERIC FONER, *A SHORT HISTORY OF RECONSTRUCTION* 30 (1990); JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 840 (1988).

287. U.S. CONST. amend. XIV, § 1; see WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLES TO JUDICIAL DOCTRINE* 58 (1988); see also Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979). The Fourteenth Amendment application of the word "person" to "all persons born and naturalized in the United States and subject to the jurisdiction thereof," left ambiguous the status of members of American Indian tribes.

288. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 41 (1867).

289. NELSON, *supra* note 287, at 58-59, 148-49.

Congress moved to fulfill the promise of the Thirteenth Amendment by passing the Anti-Peonage Act of 1867, which barred "voluntary servitude."²⁹⁰ In the West, some Chinese laborers were transported to the United States under contract labor or credit ticket systems that seemed similar to those used two hundred years earlier in the indentured servitude trade.²⁹¹ Since the late 1850s, Congress had expressed ambiguous concern over the transportation of these Chinese laborers. In 1856, proposed House resolutions referred to the transportation as "the slave trade of . . . coolies."²⁹² During the 1860s, legislation alternatively prohibited and permitted transportation of Chinese laborers under contract.²⁹³ People who had "fought to eradicate black slavery" were horrified at the possibility of another system of bound labor.²⁹⁴ Yet to nativists, "the identification of Chinese laborers with

290. An Act to Abolish and Forever Prohibit the System of Peonage . . . , Act of March 2, 1867, ch. 187, 14 Stat. 546 (1867); see STEINFELD, *supra* note 23, at 181-84; Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 475 (1989). The Act did not end all forms of contract labor. For example, the convict lease system continued in the South. See EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY SOUTH 185-222 (1984).

291. As Lucy Salyer explains, "Whether a coolie trade actually existed in the United States has been hotly debated, but most recent scholars argue that it did not. Chinese either paid their own passage or bought tickets on credit Gary Okihiro argues, however, that in practice the credit-ticket system 'was a scant advance over the earlier forms of coolie and contract labor.'" LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 259 n.55 (1995); see CHARLES J. MCCLAIN, JR., IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA 10-11 (1994).

292. Resolution of inquiry of April 7, 1856, 34th Congress, 1st sess., at 833, quoted in HUTCHINSON, *supra* note 167, at 42.

293. The history of these acts is outside the scope of the article. Lincoln signed legislation in 1862 to prohibit the transportation of Chinese under labor contracts. See HYUNG-CHAN KIM, A LEGAL HISTORY OF ASIAN-AMERICANS, 1790-1990, at 45-46 (1994). Labor contracts exchanging one year's wages for transportation were explicitly permitted by 1864 congressional legislation, thereby allowing "large numbers of Chinese immigrants" to come to the United States. *Id.* at 52; HUTCHINSON, *supra* note 167, at 48-49; but see JONES, *supra* note 107, at 175 (arguing that Chinese laborers usually paid their way). In 1869, the provisions were extended to other Asian immigrants. HUTCHINSON, *supra* note 167, at 53-54. For a description of the background of Chinese struggles in California during this period, see MCCLAIN, *supra* note 291, at 1-42; Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CALIF. L. REV. 529 (1984).

294. SALYER, *supra* note 291, at 10.

American slaves," seemed to fuel hostility toward the Chinese.²⁹⁵ Little changed in the early 1870s as continual attempts to bar the trade as "enslavement of the Chinese"²⁹⁶ coincided with a rise of anti-Chinese sentiment. On March 3, 1875, Congress passed a five-section immigration act²⁹⁷ aimed at what President Grant referred to as the "twin evils of Chinese immigration: the coolie trade and the importation of women for prostitution."²⁹⁸ The act required the free and voluntary consent of immigrants to their passage, once again holding out the belief that people were never to be actual "articles of commerce."

As the Republican control of the House of Representatives ended in 1875—and with it the last of the Reconstruction-era civil rights bills attempting to guarantee equality²⁹⁹—the Supreme Court returned in the October Term to confront the question of whether persons were "articles of commerce." Three cases raised the question of state efforts to control incoming foreign immigrants. California legislation permitted the immigration commissioner to require bonds for certain classes of Chinese women immigrants.³⁰⁰ New York and Louisiana still required shipmasters to present a list of foreign passengers and post bonds.³⁰¹ The lists and bonds were the same remnants of colonial indentured servitude legislation that the Court had struggled over throughout the antebellum period.

This time the Court had no difficulty. In June 1876, in *Henderson v. New York*, the Court stated:

[T]he transportation of passengers from European ports to those of the United States has attained a magnitude and importance far beyond its proportion at that time [of *Gibbons*] to other branches of commerce. It has become a part of our commerce with foreign nations, of vast interest to this country, as well as to the immigrants who come among us to find a welcome and home within our borders. In addition to the wealth which

295. *Id.* at 10-12.

296. HUTCHINSON, *supra* note 167, at 56-59 (quoting President Grant).

297. Act of March 3, 1875, 18 Stat. 477 (1875) (repealed 1974). The act required free and voluntary consent for importation, barred the importation of women for prostitution, and voided the labor contracts.

298. HUTCHINSON, *supra* note 167, at 65.

299. NELSON, *supra* note 287, at 149.

300. *Chy Lung v. Freeman*, 92 U.S. 275, 276 (1875). The class at issue was "lewd and debauched women." For a detailed discussion of the case, see McCLAIN, *supra* note 291, at 54-63. McClain points out the Justice Field spent most of his time during oral argument, suggesting that the Fourteenth Amendment's use of "person" "proved an intention to place foreigners on a level of equality with citizens in certain respects." *Id.* at 59.

301. *Henderson v. Mayor of New York*, 92 U.S. 259, 267, 275 (1875).

some of them bring, they bring still more largely the labor which we need to till our soil, build our railroads, and develop the latent resources of the country³⁰²

The Court then asked, "Is the regulation of this great system a regulation of commerce?" The question was rhetorical. Constitutional and congressional legislation now appeared to bar people from being articles of commerce. The legal perception that people could be articles of commerce seemed a mere formal construct. Passengers were "articles of commerce." The Court struck down all three state statutes.³⁰³ Federal immigration power over passengers under the Commerce Clause was established.³⁰⁴

As the more than one hundred years of immigration history since *Henderson* demonstrates, federal control was not necessarily better for incoming immigrants. Restrictions and exclusions continued, often more onerous than state efforts, as in the 1882 exclusion act against Chinese laborers.³⁰⁵ Indeed, the Court's desire to uphold federal exclusion of Chinese laborers led to a new theory of federal immigration power, this time grounded in inherent sovereignty.³⁰⁶ Bound labor did not disappear. When it faded, the well-being of immigrants was not the central concern. The push

302. *Id.* at 270.

303. *Id.*; see also *Chy Lung*, 92 U.S. at 280 (Chinese women passengers were also commerce). Both decisions left as an open question whether state restrictions in certain instances would be valid. They, however, started a long line of cases stating that interstate commerce included the movement of people and property. See, e.g., *Hoke v. United States*, 227 U.S. 308, 320 (1913) (upholding White Slave Traffic Act of 1910); *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203 (1885) (striking down a state tax on a ferry company that merely landed passengers in Pennsylvania).

304. McClain perceptively writes:

Chy Lung and its companion cases represented the most extensive and definitive Supreme Court opinions yet on the subject of the right of the states to regulate foreign immigration, and decisions since then have added little to the principles the high court set forth in that case. These cases represented a sharp departure from previous precedent, which was equivocal on the subject and open to the interpretation that states still possessed considerable authority in this public policy area. The three Supreme Court decisions made it abundantly clear that the states had virtually no power to affect it directly.

McCLAIN, *supra* note 291, at 62-63.

305. KIM, *supra* note 293, at 60-62; JONES, *supra* note 107, at 212-38.

306. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606-8 (1889); see *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). The commerce theory gave the federal government power over the states, but could not justify federal exclusion of certain immigrants.

for the 1885 Alien Contract Labor Act, making it illegal to prepay transportation under contract, for example, was "a rallying point for anti-immigration forces."³⁰⁷ And the experience of African-Americans, Asian immigrants, and Asian-Americans on buses, trains and other commercial carriers indicated that being a "person" under the Constitution did little to alter racism.

Yet the law had completed a circle. In the seventeenth century, few would have doubted that the transatlantic migration of British and Europeans was a commerce. By the end of the eighteenth century, however, the decline of indentured servitude and the rise in controversy over slavery suggested to some that British and European immigrants should not ever be placed in the same category as Africans and enslaved African-Americans. In the nineteenth century, disputes over slavery entangled immigration in the web of cultural perceptions of differences between slaves and other people. Only after the Reconstruction Amendments formally barred people from actually being held as potential articles of commerce under slavery or involuntary servitude could the Court accept that immigrants were "articles of commerce."

For the twentieth century, the idea of "commerce" that includes people as its objects has been a comfortable abstraction.³⁰⁸ The Court has never returned to alter the 1941 conclusion that the issue was settled. And perhaps this story of the cultural roots of the *Henderson* doctrine does not demand doctrinal change.

This story, however, does suggest that we rethink our understanding of the roots of constitutional doctrine. The need to do so was apparent recently, when the Court decided *United States v. Lopez*. Justice Kennedy accurately commented on the doctrinal confusion in Commerce Clause cases:

307. HUTCHINSON, *supra* note 167, at 87.

308. The degree to which contemporary legal culture has forgotten the dilemma over this question can be seen in a 1908 treatise on the commerce clause. Unlike current treatises, the author perceived the need to address the question of persons separately and as almost an exception to the general understanding of commerce. The author stated that "commerce in its ordinary signification consists of sales of property." In a separate section devoted to the "transportation of people," he adds: "Of course human beings are not, under conditions of freedom, the subjects of sale so that transportation of them would be included in commerce. But nothing is better established than that commerce includes transportation of persons, as well as of property." FREDERICK H. COOKE, *THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION* 17, 20-21 (reprint ed. 1987) (1908); *see also id.* at 88.

The progression of our Commerce Clause cases from *Gibbons* to the present was not marked, however, by a coherent or consistent course of interpretation; for neither the course of technological advance nor the foundational principles for the jurisprudence itself were self-evident to the courts³⁰⁹

A number of justices in *Lopez* tried to explain the erratic "history" of the Court's interpretation of the Commerce Clause.³¹⁰ Justice Kennedy, for example, suggested that the course of the Court had been directed by its attempt "to resolve contemporary disputes by enduring principles."³¹¹ Justice Thomas sought refuge in the belief of "the original understanding" of "commerce."³¹² Justice Souter alone attempted to trace, albeit without notable clarity, the changes in the "Court's conceptions."³¹³ It is this last, more difficult constitutional cultural history to which we, and the Court, should strive. As this story of the peculiar migration to this country suggests, the explanation for legal doctrine often lies, not in a faith in enduring principles or a quest for original meaning, but in the twisted history of legal assumptions, cultural perceptions, and social strife.

309. *United States v. Lopez*, 115 S. Ct. 1624, 1634 (1995) (Kennedy, J., concurring).

310. *See id.* at 1634 (Kennedy, J., concurring) ("the history of the judicial struggle to interpret the Commerce Clause"); *id.* at 1643 (Thomas, J., concurring) ("discussion of the text, structure, and history of the Commerce Clause"); *id.* (Souter, J., dissenting) ("a brief overview of Commerce Clause history"); *see also id.* at 1627 (Rehnquist, C.J., discussing the line of commerce cases beginning with *Gibbons*).

311. *Id.* at 1634 (Kennedy, J., concurring).

312. *Id.* at 1643, 1646 (Thomas, J., concurring).

313. *Id.* at 1653 (Souter, J., dissenting).